88-191

No. ______

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

UNITED GAS PIPE LINE COMPANY,
Petitioner,

v.

LOUISIANA POWER & LIGHT COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA COURT OF APPEAL, FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a federal agency order, as interpreted and made final by a federal appellate court under exclusive statutory review procedures, must be followed by a state court in a damages action when the parties to the two proceedings are the same and the agency order explicitly requires partial preemption of the pending state law claims?

2. Whether a state court may hold an interstate natural gas pipeline contractually liable for federally-regulated curtailments of natural gas service under state law standards that conflict with a federal standard of liability that the Federal Energy Regulatory Commission and federal appellate courts have determined to be necessary to protect federal interests under the Natural Gas Act?

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding that is the subject of this petition are as follows:

Louisiana Power & Light Company

Louisiana Public Service Commission

Pennzoil Company

The City of New Orleans, Louisiana

United Gas Pipe Line Company

For purposes of this Court's Rule 28.1, the petitioner herein, United Gas Pipe Line Company ("United"), is a wholly-owned subsidiary of LaSalle Energy Corp. United's affiliated companies and subsidiaries that are not wholly-owned are:

Alaskan Northwest Natural Gas Transportation Company (a partnership)

High-Island Offshore System (a partnership)

Mobile Bay Pipeline Company (a partnership)

Northern Border Pipeline Company (a partnership)

Sea Robin Pipeline Company (a joint venture)

Tarpon Transmission Company

U-T Offshore System (a partnership).

LaSalle Energy Corp. acquired United on June 30, 1987 from United Energy Resources, Inc. ("UER") and MidCon Corp. ("MidCon"). Pursuant to the pur-

chase agreement, UER and MidCon assumed liability for the payment of any judgment that ultimately might be entered in this case. UER and MidCon are wholly-owned subsidiaries of Occidental Petroleum Corporation.*

* Subsidiaries and affiliates of Occidental Petroleum Corporation that may have publicly held securities outstanding in the United States, in addition to UER and MidCon, are as follows: IBP, Inc.; Oxy Oil and Gas USA, Inc. (formerly Cities Service Company); Occidental Chemical Corporation (formerly Diamond Shamrock Chemical Company); Natural Gas Pipeline Company of America; Kentucky Ohio Transportation Co.; Church and Dwight Co., Inc.; and Canadian Occidental Petroleum Ltd.

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United Gas Pipe Line Company ("United") petitions for a writ of certiorari to review a judgment of the Court of Appeal, Fourth Circuit, State of Louisiana ("Louisiana Court of Appeal") holding United liable for curtailments of natural gas deliveries to one of its customers, respondent Louisiana Power & Light Company ("LP&L"), and awarding LP&L damages and prejudgment interest totaling approximately $180 million.

OPINIONS BELOW

The opinion of the Louisiana Court of Appeal (App. A at 1a) is reported at 517 So.2d 145. The order of the Louisiana Court of Appeal denying rehearing (App. B at 76a) is not reported. The opinion of the trial court (App. C at 77a) is not reported. The order of the Louisiana Supreme Court denying United's application for a writ of certiorari or review (App. D at 114a) is not reported.

JURISDICTION

The judgment of the Louisiana Court of Appeal was entered on April 30, 1987. The order of the Louisiana

Court of Appeal denying United's application for rehearing was entered on January 19, 1988. The order of the Supreme Court of Louisiana denying United's application for a writ of certiorari or review was entered on April 4, 1988. The order of this Court extending the time for filing the petition for certiorari to August 2, 1988 was entered on June 21, 1988. App. I at 214a. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The federal laws implicated by this petition are the Supremacy Clause of the United States Constitution, U.S. Const. Art. VI, Sec. 2, and the Natural Gas Act, Sections 1(b), 4, 7, 16, and 19(b), 15 U.S.C. §§717(b), 717c, 717f, 717o, and 717r(b) (1982). App. H at 204a.

STATEMENT

This case arises out of interrelated federal regulatory and state court proceedings that ultimately came into sharp conflict. In response to the nationwide natural gas shortage in the 1970's, the Federal Power Commission (and later its successor, the Federal Energy Regulatory Commission, both referred to herein as the "Commission") conducted extensive proceedings involving curtailments of natural gas deliveries by petitioner United, an interstate natural gas pipeline. Those proceedings culminated in a Commission ruling, affirmed by the United States Court of Appeals for the Fifth Circuit, holding that state law contract claims for damages resulting from curtailments were preempted unless a customer could prove that United's curtailments were caused by its negligence or greater misconduct. While these administrative and judicial review proceedings were being conducted, the Louisiana courts were simultaneously entertaining a contract damages action for failure to deliver gas, instituted by respondent Louisiana Power & Light Company ("LP&L"), which resulted in a $180 million judgment against United. This Louisiana judgment was based on standards of lia-

bility that differed fundamentally from the federal liability standard of negligence or greater misconduct and that ignored the federal interests protected by that standard. Petitioner seeks a writ of certiorari to correct this manifest error.

A. The Federal Regulatory Proceedings.

Under the Natural Gas Act of 1938, 15 U.S.C. §§717-717w (1982) (the "NGA"), Congress imposed a scheme of federal regulation upon the natural gas industry and designated the Commission to carry out such regulation. United is a natural gas company subject to the Commission's jurisdiction. The NGA empowers the "Commission to regulate comprehensively and effectively the transportation and sale of natural gas" in interstate commerce. *Northern Natural Gas Co. v. State Corporation Commission*, 372 U.S. 84, 91 (1963); *see also Schneidewind v. ANR Pipeline Co.*, 108 S. Ct. 1145, 1151 (1988). Some regulation of interstate pipeline activities under state law is also contemplated under the NGA, but only when such regulation neither conflicts with, nor frustrates the purposes of, legitimate federal regulatory efforts.[1]

It is within this regulatory framework that the issues in this case arose. By the early 1970's, there was a serious nationwide shortage of natural gas. This shortage, as the Court has previously explained, came about because "the regulatory structure was not working [and] . . . had led to serious production shortages." *Public Service Commission of New York v. Mid-Louisiana Gas Corp.*, 463 U.S. 319, 330 (1983). *See also Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board of Mississippi*, 474 U.S. 409, 420 (1986). Because of the shortage, virtually every major interstate pipeline, including United, was forced to curtail

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[1] This Court has frequently found state laws or regulations to be preempted by the NGA or by Commission action taken thereunder. *See, e.g., Schneidewind v. ANR Pipeline Co.*, 108 S.Ct. 1145 (1988); *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board of Mississippi*, 474 U.S. 409 (1986); *Exxon Corp. v. Eagerton*, 462 U.S. 176 (1983); *Maryland v. Louisiana*, 451 U.S. 725 (1981); *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981).

deliveries to its customers during all or a substantial portion of the 1970's.[2]

These curtailments were carried out in accordance with a 1971 Commission order directing any pipeline anticipating curtailments either to file tariff sheets setting forth a plan to effectuate the Commission's policy regarding curtailments or to state that its curtailment plan currently on file would effectuate such policy. Order No. 431, 45 F.P.C. 570, 572 (1971). In response to this order, United and numerous other pipelines duly filed their curtailment plans, which were generally placed into effect subject to Commission review and approval in individual curtailment proceedings.

Shortly after the Commission's proceedings concerning United's curtailments had commenced, LP&L attacked the Commission's jurisdiction by suing in federal court to enjoin United's curtailments. This litigation ultimately resulted in *Federal Power Commission v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972) *("LP&L I")*. In that case, the Court unanimously concluded that "uniform federal regulation" of curtailments was clearly desirable, that the Commission possessed and was properly exercising "broad powers" to effect such uniform regulation by requiring pipelines "to develop and submit rational curtailment arrangements" in tariffs filed under Section 4 of the NGA, 15 U.S.C. §717c (1982), and that the Commission's jurisdiction encompassed curtailments to direct sale customers such as LP&L, who purchased gas for their own

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[2] *See, e.g.*, H. Rep. No. 496, 95th Cong., 2nd Sess. 1, 90, *reprinted in 1978 U.S. Code, Cong. & Adm. News* 8454, 8534; *Alabama-Tennessee Natural Gas Co., et al.*, 56 F.P.C. 1709 and 56 F.P.C. 2375 (1976); Order No. 533, 54 F.P.C. 821, 822-23 (1975), *aff'd sub nom. American Pub. Gas Ass'n v. FERC*, 587 F.2d 1089 (D.C. Cir. 1978).

During the 1970's, the Commission conducted administrative proceedings involving the curtailment plans of some 29 interstate pipelines that accounted for the vast bulk of interstate sales of natural gas. *See, e.g., Alabama-Tennessee Natural Gas Co., et al.*, 58 F.P.C. 1728, 1733 (1977).

consumption, as well as to customers who purchase gas for resale. 406 U.S. at 636-41.

The Commission continued its proceedings on United's curtailment plans throughout the next fifteen years, and issued several orders modifying and/or affirming the curtailment priorities contained in United's tariff.[3] Additionally, between 1971 and 1975 the Commission twice issued rulings dealing with the extent of United's liability, if any, in the event of damage actions resulting from curtailments conducted in accordance with Commission procedures; in both cases the Fifth Circuit reversed and remanded for further consideration. *See generally United Gas Pipe Line Co. v. Federal Energy Regulatory Commission*, 824 F.2d 417, 421-23 (5th Cir. 1987) ("*United v. FERC*"), App. G at 166a-173a.

In response to the second of these remands, the Commission instituted an extensive evidentiary proceeding dealing with United's possible contract liability for curtailments.[4] In September 1982, an administrative law judge issued an initial decision, *United Gas Pipe Line Co.*, 20 F.E.R.C. (CCH) ¶63,070 (1982), and in June 1985, the Commission affirmed that decision in Opinion No. 237 and in Opinion No. 237-A denying rehearing. *United Gas Pipe Line Co.*, 31 F.E.R.C. (CCH) ¶61,336 (1985) (App. E at 115a), and 35 F.E.R.C. (CCH) ¶61,344 (1986) (App. F at 141a) (both opinions referred to herein as "Opinion No. 237"). In Opinion No. 237 the Commission concluded that to permit a curtailed customer to obtain contract damages for curtailments "irrespective of United's culpability" would violate the NGA's prohibition of undue discrimina-

[3] *See, e.g., United Gas Pipe Line Co.*, 46 F.P.C. 786 (1971), *aff'd in part and remanded in part, International Paper Co. v. FPC*, 476 F.2d 121 (5th Cir. 1973); *United Gas Pipe Line Co.*, 49 F.P.C. 179 and 49 F.P.C. 1211 (1973), *vacated and remanded, State of Louisiana v. FPC*, 503 F.2d 844 (5th Cir. 1974); *United Gas Pipe Line Co.*, 21 F.E.R.C. (CCH) ¶61,016 (1982), *vacated in part as moot and remanded on limited issue, Mississippi Power & Light Co. v. FERC*, 724 F.2d 1197 (5th Cir. 1984).

[4] *United Gas Pipe Line Co.*, 53 F.P.C. 1496 and 54 F.P.C. 796 (1975).

tion, App. E at 131a, and accordingly held that United's compliance with curtailment tariffs and orders would exonerate it "from breach of contract claims, provided that the curtailments were not caused by its negligence or willful misconduct . . . ." App. F at 141a.

United and several other parties, including LP&L, the Louisiana Public Service Commission and the City of New Orleans, sought review of the opinion in the Fifth Circuit.[5] The court affirmed the Commission's determination that the public interest required that negligence or willful misconduct be the basis for holding United liable in damages for its curtailments, concluding that such a standard was "rational and adequately supported by reasons and findings." *United v. FERC, supra*; App. G at 178a.

The Fifth Circuit also made clear that the Commission's ruling had established "a uniform federal standard of liability" and that this "federal standard of liability . . . preempts inconsistent state law standards." App. G at 181a, 184a n. 16 (citations omitted). The court went on to observe that "[a] state's use of the labels 'negligence' or 'fault' . . . does not necessarily satisfy the federal standard." *Id.* at 182a. "[T]o emphasize this point," the court

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[5] LP&L's wholesale sales of electricity are regulated by the Commission, while its retail sales are subject to the jurisdiction of the Louisiana Public Service Commission and the City of New Orleans. Both of these entities intervened and participated actively in support of LP&L's damage action below.

In the Fifth Circuit appeal from Opinion No. 237, LP&L, the Louisiana Public Service Commission and the City of New Orleans all sought to attack the opinion on the grounds that: (1) the Commission lacked jurisdiction to make the exculpatory standard applicable to direct sale customers; (2) the Commission's exculpatory standard was not in the public interest; and (3) the Commission erred in making the exculpatory standard retroactive to 1971. The Fifth Circuit held that these attacks were jurisdictionally barred because these parties had failed to comply with the NGA's procedural requirements for seeking review of Commission orders. App. G at 192a-203a. The Fifth Circuit nonetheless considered and rejected both the jurisdictional and public interest arguments. *Id.* at 176a-191a.

identified three essential elements of the federal standard: (1) it "impose[d] on customers claiming damages the burden to prove United's negligence or wrongful misconduct in causing the shortages"; (2) it required such negligence or wrongful misconduct to be established pursuant to an objective standard (*i.e.,* whether United acted as a reasonably prudent pipeline would have acted in the same or similar circumstances), which necessitated a finding that the curtailments were "reasonably foreseeable and avoidable" when the allegedly negligent actions took place; and (3) it required a showing that the "objectively unreasonable acts proximately caused nondelivery." *Id.* at 182a-183a. No party sought further review of the Fifth Circuit's decision.

B. The Louisiana State Court Proceedings.

While the Commission and the Fifth Circuit were addressing the appropriate federal standard of liability for United's curtailments, the Louisiana courts were adjudicating state law claims against United based on those same curtailments. LP&L, having lost in its attempt to enjoin United's curtailments, *LP&L I, supra,* proceeded to file a separate damages action in state court.[6] United unsuc-

[6] Several other curtailment damage actions were brought against United. One suit is currently pending in which the curtailed customer seeks approximately $63 million for breach of contract and treble this amount because the curtailments allegedly violated antitrust laws. *Mississippi Power Co. v. United Gas Pipe Line Co.,* No. S74-258 (L) (S.D. Miss., filed Nov. 14, 1974). Two suits brought by other Louisiana electric utilities and/or their customers were consolidated for trial with the *LP&L* case and were subsequently settled. In another suit, a federal court bifurcated trial on liability and damages, and then conducted a trial and issued a memorandum on liability. *Texasgulf, Inc. v. United Gas Pipe Line Co.,* 610 F. Supp. 1329, 1357 (D.D.C. 1985). In its memorandum, which was issued before the Commission decided Opinion No. 237, the court held that United was exonerated only if its gas shortage could not have been prevented or overcome by "due diligence" or "due care," that United had not exercised due care in entering the contract with the customer in October 1967 or in performing under the contract thereafter, and that such lack of due care had been a "substantial factor" in causing United's shortage and rendered United liable in damages. 610 F. Supp. at 1338, 1342-57. However, before trial

cessfully sought to remove the suit to federal court. *City of New Orleans, et al. v. United Gas Pipe Line Co.*, 390 F. Supp. 861 (E.D. La. 1974). United also twice moved to refer issues to the Commission for exercise of its primary jurisdiction in the curtailment proceedings—proceedings in which United, LP&L, and other parties to the lawsuit were participating—and to stay trial in the interim. The trial court rejected both motions,[7] and commenced a non-jury trial in January 1982. In August 1984, the court entered a judgment holding United liable for breach of its contracts and awarding LP&L $40.3 million in damages, plus prejudgment interest and costs. *Louisiana Power & Light Co. v. United Gas Pipe Line Co.*, No. 579-040 (Civ. Dist. Ct., Parish of Orleans, La. Aug. 24, 1984). App. C at 77a.[8]

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on the amount of damages attributable to United's lack of due care, the parties settled and the court subsequently held that its memorandum on liability "should have no legal effect." *Texasgulf, Inc. v. United Gas Pipe Line Co.*, 617 F. Supp. 41 (D.D.C. 1985).

[7] *City of New Orleans, et al. v. United Gas Pipe Line Company*, Nos. 575-544, *et al.* (Civ. Dist. Ct., Parish of Orleans, La., orders entered June 26, 1979 and October 23, 1981). The court rejected the motions notwithstanding the fact that the Fifth Circuit earlier had affirmed the Commission's primary jurisdiction over several issues raised in another curtailment damage suit against United—including the causes of United's shortage and the effect of United's tariff upon its alleged liability for curtailments—and had approved referral of the issues and stay of trial in the interim. *Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 532 F.2d 412 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094 (1977). Pursuant to this Fifth Circuit decision, all federal district courts in which curtailment damage suits against United were pending—but not the Louisiana trial court—stayed trial and referred issues to the Commission, which accepted several of them for determination. *See United Gas Pipe Line Co.*, 4 F.E.R.C. (CCH) ¶61,151 at 61,354 (1978).

[8] In its suit, LP&L had also claimed that United was liable because the curtailments constituted a bad faith breach of contract, a tortious violation of other duties allegedly owed LP&L, and a violation of the antitrust laws of Louisiana. The trial court dismissed LP&L's antitrust claims at the close of the plaintiffs' consolidated case (Civ. Dist. Ct., Parish of Orleans, La., order entered March 31, 1983), and on appeal this order was affirmed by the Louisiana Court of Appeal. *Louisiana Power & Light Co. v. United Gas Pipe Line Co.*, 518 So.2d 1050 (La. App. 4th Cir. 1987), *writ denied*, 523 So.2d 232 (La. 1988). The trial

The trial court ruled that the sole issue presented was whether United's curtailments breached its contractual delivery obligation. App. C at 84a. It concluded that the curtailments constituted a failure to perform the obligation and that neither the contracts specifically, nor Louisiana law generally, excused United's nonperformance. *Id.* at 86a-91a. The trial court also ruled that it did not have to await the Commission's determination on whether United's tariffs or Commission orders precluded or limited the imposition of liability since (in the court's view) under Louisiana law no tariff or order could excuse United's nonperformance because "United's shortage of supply was induced by the unrealized expectations and imprudent decisions of United and its management." *Id.* at 94a-95a.[9]

On appeal, the Louisiana Court of Appeal upheld United's liability, increased the principal sum of damages to approximately $90 million, and awarded approximately $90 million in additional prejudgment interest. App. A at 75a. The court repeatedly emphasized that United's liability derived from contract, *i.e.*, that United had failed to perform its contractual obligations, both express and implied, and that LP&L's damages were the result "of the breach of duties arising exclusively from contracts." *Id.* at 8a-10a, 40a. Although the court issued its decision after Commission Opinion No. 237 was entered (but before the Fifth Circuit's affirmance of that opinion), the decision never referred to the Commission's opinion and contained only the following passing reference to "negligence:"

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court subsequently rejected LP&L's claims that United had breached its contracts in bad faith and was liable to LP&L in tort (App. C at 95a) and these holdings were affirmed by the Louisiana Court of Appeal. App. A at 4a, 39a-41a, 70a-71a.

[9] The court never found United to have been negligent, *see* n. 13, *infra*, never identified the standard for determining whether United's decisions were "imprudent," never considered the effect of Commission orders or policies that approved or influenced such decisions, never addressed the question whether United's "expectations" were unreasonable as opposed to "unrealized," and never acknowledged the industrywide shortage of natural gas or compared United's experience to that of other pipelines.

> These cases [federal decisions issued prior to Opinion No. 237] support the view that, notwithstanding that federal orders or tariffs may override any state law liability akin to strict liability or liability without fault, breaches of contract not only by willful misconduct, but also by negligence or lack of due diligence, are governed by state law standards. This defense [based upon federal curtailment orders and tariffs] seems to be no more than a restatement of the "duly constituted authorities" clause defense discussed earlier, and we deem it equally insufficient to avoid United's liability.

App. A at 18a.

In short, the court concluded that federal curtailment orders or tariffs were relevant to United's liability only as a state law "defense" to a breach of contract claim, and the court rejected this defense on two related state law grounds. The first was that the curtailment orders had not caused United's shortage but had merely allocated an existing shortfall, and accordingly that United had not proved that these orders were "the cause of United's failure to meet its contractual delivery obligations to its customers, including LP&L . . . ."[10] The second was that

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[10] App. A at 17a. In determining the relevance of Commission curtailment orders, the court erred factually as well as legally. United's tariff (and its contracts with LP&L) had contained a "power plant preference" that, in times of shortage, placed a substantial portion of LP&L's fuel requirements above those of other customers. *See* App. A at 20a-21a. In a 1973 curtailment order, the Commission invalidated this "power plant preference," thereby immediately requiring United to redirect significant amounts of gas to other customers that otherwise would have been delivered to LP&L. *United Gas Pipe Line Co.*, 49 F.P.C. 179 (1973). While this order was subsequently vacated and remanded on other grounds, *State of Louisiana v. FPC*, 503 F.2d 844 (5th Cir. 1974), the "power plant preference" was never reinstated. According to United's undisputed evidence, LP&L's damages for alternative fuel would have been less by $41.5 million plus interest—in total almost $90 million—had the Commission not required that United's available gas be reallocated to other customers. R. United Ex. 774.

United's actions had caused its shortage because the "actions, however reasonable in other contexts, were not reasonable in the context of firm requirements contracts, because they did not constitute a reasonable effort to perform those contracts, *especially in their implied obligations to have and maintain, or to acquire, at whatever cost, the gas necessary to fulfill the explicit delivery obligations.*" App. A at 8a-9a (emphasis added).

United lodged the Louisiana Court of Appeal decision with the Fifth Circuit during the appeal of Opinion No. 237, asserting that the decision demonstrated why a standard of liability greater than negligence was required. The Fifth Circuit, however, concluded that a higher standard of liability was unnecessary because the federal negligence standard, viewed as one of substance, not labels, adequately protected federal interests. *See* pp. 6-7, *supra*.

The Fifth Circuit also took specific note of the infirmities of the Louisiana Court of Appeal decision:

> While we recognize that United may have legitimate concerns about the state court's treatment of federal preemption, burden of proof and breach of good faith duty to provide gas "whatever the cost," we have no basis for concluding other than that the Louisiana Supreme Court will enforce the federal standard and we express no opinion about the case.

App. G at 181a-182a, n. 15. These comments notwithstanding, the Louisiana Court of Appeal rejected United's subsequent petition for rehearing without opinion, App. B at 76a, and the Louisiana Supreme Court likewise denied United's application for a writ of certiorari without opinion. App. D at 114a.[11]

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[11] On April 6, 1988, the Supreme Court of Louisiana stayed execution of the judgment pending the timely filing and disposition of a petition for a writ of certiorari with this Court. No. 88-C-0406 (La. April 6, 1988).

REASONS FOR GRANTING THE WRIT

Sixteen years ago this Court decided *LP&L I, supra*, holding that the Commission could order pipelines to curtail deliveries of natural gas to particular customers—whether or not such deliveries were otherwise required by contract—to assure uniform and equitable distribution in a time of national shortage. The issues in the present case arise out of the Commission's efforts to resolve a second, closely-related question: whether customers unable to obtain their full contractual deliveries could recover damages for any shortfall. The Commission, in proceedings to which both United and LP&L were parties, concluded that they could not, unless United actually caused the shortage through its negligence or greater misconduct. The Fifth Circuit affirmed that decision, noting that the Commission had established a federal standard with specific content and that state courts—including specifically the courts below—were obliged to follow it.

The courts below, however, did no such thing. In upholding the largest judgment ever rendered in the Louisiana courts, the courts below steadfastly adhered to their own view of contract-based liability and refused, without explanation, to determine whether United had been negligent or worse. Whatever the reasons for this indifference, it was error on at least two important grounds. First, in failing to follow the decision of the Fifth Circuit, which construed and affirmed the Commission's order, the Louisiana courts flouted the exclusive review power granted to federal courts of appeals under the NGA. *See* 15 U.S.C. §717r (1982); *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958). Second, even leaving aside the affirmance by the Fifth Circuit, the state courts did not give necessary weight to the *Commission's* order, which unmistakably preempted all contractual liability absent a determination of negligence. *See, e.g., City of New York v. Federal Communications Commission*, 108 S. Ct. 1637 (1988).

The result of the proceedings below has thus been to place United in an impossible position. On the one hand,

in a Commission order upheld by the Fifth Circuit, United was to have been protected by a federal standard of liability that requires proof of negligence as a pre-condition to recovering damages; on the other, in a judgment entered in and affirmed by the Louisiana courts, United has been subjected to a nearly $200 million judgment rendered without regard to the federal standard. This disregard of federal law, and of the regulatory scheme enacted in the NGA, can be corrected only by this Court.

I. THIS COURT SHOULD GRANT CERTIORARI TO PROTECT THE INTEGRITY OF EXCLUSIVE STATUTORY PROCEDURES FOR REVIEW OF FEDERAL AGENCY ACTION AND TO ENSURE COMPLIANCE WITH FINAL AGENCY ACTION.

This case, first of all, raises a central issue regarding the authority of federal courts of appeals to render decisions, on direct review of agency orders, that are binding on state courts. The NGA provides that "aggrieved" parties "may obtain a review of [a Commission] order in [a] court of appeals of the United States . . . ." 15 U.S.C. §717r (1982). The statute sets out procedural and substantive requirements governing such appeals, and makes clear that "[t]he judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, *shall be final*, subject to review by the Supreme Court of the United States . . . ." *Id.* (emphasis added).[12] As noted earlier, the Commission order at issue in this case was affirmed by the Fifth Circuit, and no further review was sought.

The finality of these NGA proceedings has been directly undercut by the proceedings below. In affirming the Commission order, the Fifth Circuit acknowledged that United

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[12] The provisions for appellate review under the NGA are characteristic of those used by Congress in regulatory programs that it establishes. *See generally* 28 U.S.C. §2341, *et seq.* (1982). Accordingly, this case has importance across the spectrum of the federal administrative process.

had "legitimate concerns" about the Louisiana courts' failure, up to that time, to honor the standard established by the Commission. Nevertheless, it rejected those concerns as a reason for requiring the Commission to adopt an even higher standard, saying that it saw "no basis for concluding other than that the Louisiana Supreme Court will enforce the federal standard." App. G at 181a-182a, n. 15. That conclusion, however, soon proved to be illusory. Shortly thereafter, the Louisiana Court of Appeal and the Louisiana Supreme Court denied all further petitions for review.

The effect of these actions is to leave in place a decision that conflicts with that of the Fifth Circuit in several crucial respects. To begin with, the Louisiana court never measured United's behavior in terms of what a reasonably prudent pipeline would have done under the same or similar circumstances. Instead, the court held that whether United's actions were "reasonable" had to be determined "in the context of firm requirements contracts" and specifically in the context of "implied obligations," read into the contracts by the court, "to have and maintain, or to acquire, at whatever cost, the gas necessary to fulfill the explicit delivery obligations." App. A at 8a-9a. Moreover, at no time did the court impose on LP&L the burden of proving negligence;[13] nor did it ever inquire, much less decide, whether United "with reasonable efforts could . . . have foreseen and avoided" the shortage. App. G at 182a.[14]

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[13] While it once mentioned the term "negligence," *see* pp. 9-10, *supra*, the Louisiana Court of Appeal never assessed United's behavior in accordance with the requisite elements of negligence and repeatedly emphasized that United retained the burden of proving that it had acted without fault of any kind. App. A at 4a-5a. Indeed, the trial court specifically struck language stating that United had been "negligent" in causing the shortage from the proposed post-trial findings and conclusions submitted by LP&L and other parties.

[14] Ironically, the Louisiana Supreme Court, in a 1978 decision involving an intrastate pipeline, stated that "[t]o charge the company with foresight of the present national energy shortage in the 1960's would set a standard of acuity that could be met by very few, if any,

Finally, having failed to make these initial determinations, the Louisiana court was in no position to make the dependent finding that negligence in the face of a foreseeable shortage was the "proximate cause" of LP&L's claimed injury.[15]

The refusal by the Louisiana courts to apply the Fifth Circuit's ruling is in open disregard of the scheme established by Congress under the NGA. That Act commits appellate review of Commission orders "exclusive[ly]" to the federal courts of appeals and further provides that the decisions of such courts "shall be final" subject only to review by this Court. 15 U.S.C. §717r (1982). This Court has held that this judicial review provision means just what it says and that the decisions of federal courts of appeals are not open to collateral attack. *City of Tacoma v. Taxpayers of Tacoma,* 357 U.S. 320 (1958) (construing the judicial review procedures of the Federal Power Act, 16 U.S.C. §825 l(b) (1982), which are identical to those of the NGA). *See also Port of Boston Marine Terminal Association v. Rederiaktiebolaget Trans Atlantic,* 400 U.S. 62, 72 (1970) (where an agency decision has become final "neither the District Court nor any Court of Appeals nor this Court had or has authority to review the merits of that decision").

The NGA thus does not permit the Louisiana courts to ignore requirements of a Commission order set forth by the Fifth Circuit on direct review of that order.[16] Whether

in the natural gas industry . . . ." *Sugar Bowl Gas Co. v. Louisiana Public Service Commission,* 354 So.2d 1014, 1021 (La. 1978).

[15] Indeed, despite the facts that virtually all pipelines suffered significant gas shortages in the 1970's and that substantial curtailment of gas deliveries to LP&L resulted directly from a Commission order invalidating a curtailment preference for LP&L that had been in United's tariff, *see* n. 10, *supra,* the Louisiana courts held United liable for every cubic foot of gas that LP&L failed to receive.

[16] The specific requirements of the federal standard elucidated by the Fifth Circuit regarding burden of proof, an objective test of reasonableness, including foreseeability, and a showing of proximate cause, are clearly part of the court's holding and cannot properly be called "dicta"

or not the state courts agree with the Fifth Circuit's construction of the order, the fact remains that the construction binds the courts in any litigation wherein the same parties attempt to contest the order's scope or its preemptive effect. If a party believed that the Fifth Circuit had misconstrued the Commission order—or had affirmed it on an improper basis—the appropriate course of relief, also provided for by Congress, was to seek rehearing in the federal appeals court or to petition for review in this Court. *See, e.g., Federal Power Commission v. Idaho Power Co.*, 344 U.S. 17 (1952). What a party cannot do, however, is what LP&L and its Louisiana governmental allies did in this case: urge a potentially more sympathetic state court to substitute its own views for those of the federal reviewing court.[17] Congress can hardly have intended to give the federal courts exclusive jurisdiction to review an agency's orders and yet allow other courts to interpret them as they see fit, especially where inconsistent interpretations undermine the federal interests protected by the agency's determination.

It is important to note in this regard that, unlike LP&L, the Commission did not believe that the Fifth Circuit misconstrued its order. The Commission not only declined to

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as LP&L suggested in the courts below. The articulation of the requirements was in direct response to United's claim that the Commission's adoption of an unspecified negligence test, without more, would be arbitrary and capricious. In rejecting this claim, and in affirming the Commission's order, the Fifth Circuit expressly relied on its construction of the underlying order as inherently embodying these requirements through adoption of the "negligence" standard.

[17] In its brief to the Louisiana Supreme Court opposing United's application for a writ of certiorari to review the Louisiana Court of Appeal judgment, LP&L denominated one of its arguments "This Court is Not Bound By The Fifth Circuit Opinion" and argued that "Louisiana courts have held that although decisions of the United States Supreme Court construing federal statutes are binding on state courts, the decisions of federal district courts and courts of appeal are not binding." "Louisiana Power & Light Company's Brief in Opposition to Application for Writ of Certiorari or Review by United Gas Pipe Line Company" at 8, *Louisiana Power & Light Company v. United Gas Pipe Line Company, et al.*, No. 88-C-0406 (La. Sup. Ct., filed Feb. 18, 1988).

seek further review but subsequently urged adoption of the Fifth Circuit's decision in an appeal to the United States Court of Appeals for the District of Columbia Circuit from an order involving another pipeline's liability for curtailments. The D.C. Circuit agreed, adopting "as our own the well-reasoned position set forth in *United Gas Pipe Line Co. v. FERC*, 824 F.2d 417, 425-30 (5th Cir. 1987)".[18] Accordingly, as matters now stand, United is faced with a bizarre situation in which the *Commission* considers the Fifth Circuit's decision to be binding, but the Louisiana courts apparently do not.

If the power of reviewing courts stops short of giving a binding construction to an agency order on direct review, that is a rule that should be announced directly by this Court, not adopted *sub silentio* by the Louisiana courts. On the other hand, if state courts are bound by the terms of a federal court of appeals' affirmance of an agency order, then the judgment below is a direct affront to that principle. Either way, review by this Court is appropriate.

II. THIS COURT SHOULD GRANT CERTIORARI TO PROTECT THE FEDERAL INTERESTS IN THE REGULATION OF INTERSTATE PIPELINES THAT ARE UNDERMINED BY THE LOUISIANA JUDGMENT.

Even if the Fifth Circuit's decision in *United v. FERC* were not binding on the Louisiana courts, the decision below is inconsistent with the *Commission's* order and cannot stand. The Louisiana decision based United's liability upon preempted state contract standards and failed to apply the federal liability standard, thereby jeopardizing the federal interests protected by that standard.

This Court has frequently made clear that, under the Supremacy Clause, state law must give way in the face of paramount federal law. *See, e.g., Schneidewind v. ANR*

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[18] *Transcontinental Gas Pipe Line Corp. v. FERC*, No. 86-1358 (D.C. Cir., order entered Feb. 16, 1988), *reh'g granted in part and denied in part* (April 22, 1988).

Pipeline Co., 108 S. Ct. 1145, 1150 (1988); *Fidelity Federal Savings & Loan Association v. De la Cuesta*, 458 U.S. 141, 152-54 (1982). Although Congress often preempts state law by statute, the Court "ha[s] also recognized that 'a federal agency acting within the scope of its congressionally delegated authority may preempt state regulation' and hence render unenforceable state or local laws that are not otherwise inconsistent with federal law." *City of New York v. Federal Communications Commission*, 108 S. Ct. 1637, 1642 (1988), (citing *Louisiana Public Service Commission v. Federal Communications Commission*, 476 U.S. 355, 369 (1986)); *see also Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 700-05 (1984); *United States v. Shimer*, 367 U.S. 374, 383 (1961). Here, the judgment of the Louisiana Court of Appeal not only is directly contrary to a valid agency order but undermines important federal interests in the uniform and effective regulation of natural gas pipelines.

A. The Federal Standard and Federal Interests.

This Court's decision in *LP&L I, supra*, dealt with only one part of the threat to federal interests posed by state regulation of curtailments. *LP&L I* affirmed the Commission's plenary authority to regulate curtailments in the public interest irrespective of contract and free from suits for injunctive relief. However, United and other pipelines, having made deliveries according to the priorities established by the Commission, were still faced after *LP&L I* with suits for damages based upon the failure to provide the gas called for in individual contracts.

In Commission proceedings that addressed United's potential liability, the Commission held that, at a minimum, liability had to be based upon a judicial "determination of whether United's management's actions or inactions concerning its shortages meet the elements of common-law negligence . . . ." App. E at 127a. In so holding, the Commission expressly refused to adopt the view "that contract entitlements are sacrosanct and should govern curtailment allocations." *Id.* at 131a. To the contrary, the Commission concluded that back-door enforcement of private contracts

through claims for damages would be against the public interest, finding that it would be "unduly preferential" if customers could obtain "contract damages for the monetary equivalent of the shortages, irrespective of [United's] culpability." *Id.* The Commission pointed out that "[a]wards under such circumstances would either directly (by being passed on through rate increases) or indirectly (through weakening the pipeline's financial condition) adversely affect the remaining customers of United." *Id.* [19]

The balance between federal and state interests struck by the Commission[20] plainly recognizes that liability for "negligence" and liability for breach of contract are two different things. If a state court could impose liability by calling a pipeline "negligent" simply because it did not accumulate a supply of gas equal to its total contractual obligations, the court would effectively be doing just what the Commission intended to prohibit: granting preferences to some customers, and harming other customers, through the award of contract-based damages. Thus, the Fifth Circuit, noting that the term "negligence" is "plastic in the hands of some courts," spelled out the "elements of common-law negligence" adverted to by the Commission: burden of proof, a test of "objective reasonableness," foreseeability, and proximate cause—and emphasized how such a standard differs from preempted contract standards. *See* discussion *supra,* pp. 6-7.

The standard adopted by the Commission also assures that the actions of a pipeline are assessed in the proper

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[19] This Court has concluded that damage actions under state law can adversely affect federal interests just as easily as can claims for injunctive relief. *See, e.g., San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 247 (1959) (prohibited state "regulation can be as effectively exerted through award of damages as through some form of preventive relief").

[20] The determination that a minimum federal standard of liability must be applied in state damage actions as a means of accommodating federal and state interests is consistent with the approach this Court adopted in *Linn v. United Plant Guard Workers,* 383 U.S. 53 (1966), and *Old Dominion Branch No. 496 v. Austin,* 418 U.S. 264, 279 (1974).

regulatory context. United's curtailments to LP&L and other customers were not an isolated phenomenon; they arose out of a nationwide shortage of natural gas that affected virtually every major pipeline and that, as this Court and other courts have recognized, was caused at least in part by federal regulatory policies. *See* pp. 3-4, *supra*. Moreover, disputes over the reasons for a particular pipeline's lack of adequate supply necessarily implicate that pipeline's purchasing practices, an area central to the Commission's NGA jurisdiction.[21] Under the NGA pipelines are not charged solely to have gas available for customers; they are required to manage gas supplies economically and efficiently in order to provide gas at the lowest reasonable cost.[22] The negligence standard adopted by the Commission properly recognizes that any assessment of liability must accord due regard to industry norms and to these interdependent regulatory concerns.[23]

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[21] This Court has held that the gas purchasing practices of pipelines are within the Commission's exclusive jurisdiction. *See Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Board of Mississippi*, 474 U.S. 409 (1986); *Northern Natural Gas Co. v. State Corporation Commission*, 372 U.S. 84 (1963).

[22] *Atlantic Refining Co. v. Public Service Commission of New York*, 360 U.S. 378, 380 (1959); *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 611 (1944); *Midwestern Gas Transmission Co.*, 36 FPC 61, 70 (1966), *aff'd, Midwestern Gas Transmission Co. v. FPC*, 388 F.2d 444 (7th Cir.), *cert. denied*, 392 U.S. 928 (1968).

[23] In an earlier curtailment order holding that United should be exonerated from liability unless it were "shown that the pipeline's need to curtail resulted from its own negligence, bad faith, or other wrongful conduct," the Commission observed:

> Furthermore, attacks upon a pipeline's gas procurement activities must recognize that (a) gas availability of an interstate pipeline is determined in large measure by government policies, producer decisions concerning exploratory and developmental drilling activity and state conservation orders, and (b) that jurisdictional producer prices are prescribed by the Federal Power Commission; neither are controlled solely by independent pipeline decisions. Recognition must also be given to prior certificate authorizations by this Commission, so that no new or expanded sales occur independently of

B. The Liability Standards Applied by the Louisiana Courts.

In holding United liable in damages for its curtailments, the Louisiana courts simply went off in a different direction. Regarding the case largely as a private contractual dispute to be decided according to state law standards, the Louisiana Court of Appeal placed the burden of proof on United to establish that its conduct was proper; never analyzed how a reasonably prudent pipeline would have acted under similar circumstances; never determined when a shortage necessitating curtailments on United's system was reasonably foreseeable; and never made the requisite finding of proximate cause. *See* discussion, *supra*, pp. 14-15.

The failure to apply the basic federal standard—bad enough in itself—was made even worse by the standard that the state court *did* apply. The heart of the court's decision was its conclusion that United wrongfully neglected its "implied [contractual] obligations to have and maintain, or to acquire, *at whatever cost*, the gas necessary to fulfill the explicit delivery obligations."[24] This basis for liability undercuts federal interests in several distinct, though related, ways.

> our jurisdiction and only then after hearings and appropriate findings of fact and conclusions of law.

United Gas Pipe Line Co., 49 F.P.C. 1211, 1220 (1973).

[24] App. A at 8a-9a (emphasis added). This emphasis on the irrelevance of cost is repeated throughout the decision. For example, with respect to United's negotiations with producers in the early 1960's that, in some instances, resulted in the release of reserves, the Louisiana Court of Appeal found that

> United does show that take-or-pay costs and other considerations prompted its business decisions, but increased costs to perform do not excuse nonperformance of contracts.

App. A at 11a. Similarly, the court also found that United did not perform its contracts in good faith because it took certain actions "for business reasons aimed not at performance of its contracts but at saving costs . . . ." *Id.* at 15a.

First, and most evidently, applying this standard is simply another way of holding United strictly liable for breach of contract. Except when gas is unavailable at any cost, it may be theoretically possible for a pipeline to store up gas supplies to meet all of its future delivery requirements, but that possibility says little about whether it was negligent for the pipeline not to do so. As the Fifth Circuit noted, "defining the pipeline's duty of care as derived from the contract obligations and defining the breach of duty as negligent failure to perform is indistinguishable from the preempted contract standard . . . ." App. G at 183a.

Second, while concluding that United's obligation was to acquire gas "at whatever cost," the Louisiana court made no attempt to measure that supposed duty against the practices of a reasonably prudent pipeline. That inquiry, in turn, would have required the court to determine whether various decisions to release reserves, or not to acquire additional reserves, were made at a time when a future shortage of natural gas was reasonably foreseeable. As the Fifth Circuit observed, "[i]f the need for curtailment was not reasonably foreseeable, imposition of liability for curtailments does little to encourage prudent management." *Id.* at 183a. Yet, in the proceedings below, the Louisiana court was particularly critical of United's decision to release gas reserves *in 1962*—almost a decade before its shortages began. App. A at 9a. But if that conduct did not depart from the conduct expected of a reasonably prudent pipeline at that time, then it cannot be deemed negligent solely by reference to a later need to curtail in a time of unexpected shortage.

Third, the emphasis on maintaining gas supplies "at whatever cost" is totally foreign to the regulatory environment in which pipelines long have operated and continue to operate. While the acquisition of costly supplies as an insurance policy for uninterrupted service to Louisiana customers may be of paramount importance to the Louisiana courts, the NGA and the Commission do not

take so rigid a view.[25] To the contrary, as previously noted, they require pipelines to maintain inventories at a cost and at a level that permits adequate service to gas consumers at the lowest reasonable cost. *See* n. 22, *supra*. Indeed, the Commission has found pipelines to be "imprudent" when they have bound themselves to high-priced supply contracts that unduly increase costs to customers.[26]

As this Court has often acknowledged, the service performed by a pipeline under Commission certificate is premised on a federal obligation to render service distinct from the pipeline's contractual arrangements with its customers. *California v. Southland Royalty Co.*, 436 U.S. 519, 526 (1978); *Sunray Mid-Continental Oil Co. v. Federal Power Commission*, 364 U.S. 137, 152-53 (1959). A determination that a regulated pipeline has been negligent cannot be made without regard to this federal obligation. The kind of actions for which the Louisiana courts have imposed liability are precisely the kind of actions that the Commission regulates or oversees under the Act: how much gas the pipeline should have acquired and when; how much it should have paid; whether and under what circumstances it reasonably should have reduced the amount of reserves it had under contract; and whether and when it should have added new service obligations or expanded existing ones. In fact, some actions criticized by the Louisiana

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[25] For example, in its landmark 1965 decision in the *Permian Basin Area Rate* proceeding, the Commission stated:

> There is considerable doubt that it is desirable, from the point of view of the public or the industry, to require or encourage a high level of proven reserves many years in advance of their probable use. It is an extremely costly matter to find and hold reserves beyond those which are needed to assure ample supplies to consumers.

Permian Basin Area Rate Proceeding, Opinion No. 468, 34 F.P.C. 159, 184 (1965). The Commission's order was ultimately sustained by this Court in *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968).

[26] *See, e.g., Columbia Gas Transmission Corp.*, 42 F.E.R.C. (CCH) ¶61,021 (Jan. 19, 1988).

courts, and used as a basis for imposing liability, were actions specifically approved by the Commission.[27]

The contract-based standards applied by the Louisiana Court of Appeal disregarded this interplay between private contracts and federal regulation. Indeed, the court found that United's actions may well have been "reasonable in other contexts," but "were not reasonable in the context of firm requirements contracts . . . ." App. A at 8a-9a. But it is not for state courts, mandated by federal law to apply a standard of negligence, to establish their own unique priorities for regulated pipelines; they must take the regulatory environment as they find it, and determine whether, in light of all the objectives to be served, a particular pipeline departed from reasonable and accepted practice. *Cf. Chicago & Northwestern Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 325-26 (1981). The Louisiana courts demonstrably failed to do this.

It is also significant that the Louisiana Court of Appeal gave no weight to a specific Commission order—one eliminating the "power plant preference" *(see* n. 10, *supra)*—that prevented United from complying with priorities established in its contract with LP&L. While not disputing that absent the order United could have greatly increased its deliveries to LP&L, the court reasoned that the initial failure to acquire adequate supplies was enough to make United liable for all shortfalls in delivery, regardless of intervening Commission orders. App. A at 21a. But this theory turns the contract into a one-way street, giving

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[27] For example, most of the "additional sales" and some of the "released reserves" criticized by the Louisiana Court of Appeal, App. A at 15a, were authorized by the Commission. The Fifth Circuit strongly suggested that such regulatory approval would, as a matter of law, bar state courts from imposing liability for those actions, stating that: "to the extent United is concerned that some of its actions taken under Commission supervision and determined to be in the public interest may become the basis of liability when evaluated by a court or jury, United is already protected under case law." App. G at 184a, (citing *Chicago & Northwestern Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981)).

LP&L a contractual right to damages for shortfalls in delivery, even though the Commission denied United its right under the same contract to give LP&L priority in delivery that would have reduced United's liability to LP&L. The effect is hardly inconsequential: because of its inability to deliver in accordance with the power plant preference, United's liability to LP&L was increased by nearly $90 million.[28]

The approach followed by the Louisiana court is thus clearly at odds with important federal policies. As this Court pointed out in *LP&L I, supra*, 406 U.S. at 633-34, there are natural, and seemingly unavoidable, tensions between national and local interests when natural resources are scarce. These conflicts do not vanish once the immediate decision regarding allocation of existing supply has been made. Demands by customers for damages, enforced by state courts, can interfere with the federal curtailment scheme just as demands for specific performance.

Nor are such conflicts solely of historical interest. For example, the Commission is currently encouraging pipelines to release surplus gas as part of the Commission's effort to create a competitive nationwide market for natural gas at market prices.[29] In this regard, the Commission

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[28] Thus, even if United were to be held liable for some portion of the non-delivery to LP&L, it cannot, consistently with principles of federal preemption, be held liable for non-delivery caused by direct prohibitions in a Commission order.

[29] *See, e.g.*, Order No. 500, F.E.R.C. Statutes and Regulations (CCH) ¶30,761 (1987), *appeal pending sub nom. American Gas Association v. FERC*, Nos. 87-1588, *et al.* (D.C. Cir.); *Notice of Issuance of Proposed Policy Statement and Opportunity for Public Comments*, 38 F.E.R.C. (CCH) ¶61,230 (1987); Order No. 436, F.E.R.C. Statutes and Regulations (CCH) ¶30,665 (1985), *vacated and remanded sub nom. Associated Gas Distributors v. FERC*, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 1468 (1988).

recently emphasized its intent, and that of Congress under the Natural Gas Policy Act, 15 U.S.C. §3301, *et seq.* (1982), to permit pipelines (or other purchasers of gas) to abandon such purchases under expired, terminated or modified gas purchase contracts whenever they "conclude that it is no longer economically efficient to continue . . . [such] purchases . . . ."[30] The Louisiana judgment, in holding that a pipeline risks liability by failing to hoard supplies, cuts directly against this federal policy.

The Louisiana decision could also make it more difficult for the Commission to effectuate curtailment orders in the future. The lesson taught by the Louisiana courts in this case is that pipelines depart from their contracts, even pursuant to federal curtailment orders, at their peril. If the decision below is left intact, Commission efforts in the future to allocate scarce supplies according to the public interest, and irrespective of contract, would subsequently present the Commission with the choice of having pipelines or their customers bear the cost of substantial damage awards. At the same time, the approach adopted by the Louisiana courts will frustrate federal policy by "creat[ing] incentives for the pipelines to resist a federal curtailment scheme." App. G at 178a-179a.

The simple fact is that interstate pipelines cannot serve two masters. Nor can the Commission be at war with various state bodies or courts, either in exercising its regulatory responsibilities under the NGA or in determining how such exercise affects the enforcement of private contract rights. As it did sixteen years ago with respect to LP&L's action to enjoin United's curtailments, this Court should review LP&L's thus far successful action to obtain damages arising out of those same curtailments. In both cases, a state's interest in contract enforcement conflicts with—and must yield to—paramount federal interests.

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[30] Order No. 490, *Abandonment of Sales and Purchases of Natural Gas Under Expired, Terminated, or Modified Contracts*, F.E.R.C. Statutes and Regulations (CCH) ¶30,797 at 31,026 (1988), *reh'g denied*, RM87-16-001 (July 22, 1988).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 2, 1988

(2)

No. 88-191

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

UNITED GAS PIPE LINE COMPANY,
Petitioner,

v.

LOUISIANA POWER & LIGHT COMPANY,
Respondent.

Petition for a Writ of Certiorari to the Louisiana Court of Appeal, Fourth Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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August 2, 1988

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INDEX

APPENDIX A

CITY OF NEW ORLEANS;
BLAKE G. ARATA *et al.*, representatives, etc.;
and NEW ORLEANS PUBLIC SERVICE, INC.
v.
UNITED GAS PIPE LINE COMPANY.

LOUISIANA POWER & LIGHT COMPANY
v.
UNITED GAS PIPE LINE COMPANY
AND PENNZOIL COMPANY.

Nos. CA 3613, CA 3614.

Court of Appeal of Louisiana,
Fourth Circuit.

April 30, 1987.

As Corrected May 13, 1987.

Rehearings Denied Jan. 19, 1988.

Utilities sought to recover against supplier for breach of contracts to deliver natural gas for electric power plants. The Civil District Court, Parish of Orleans, George C. Connolly, Jr., J., entered judgments for utilities, and supplier appealed on liability issue, and utilities appealed on issue of damages. The Court of Appeal, Redmann, C.J., held that: (1) supplier's management of its gas supplies, including releases, acquisitions and sales, however reasonable in other contexts, was not reasonable in context of delivery requirements contained in contracts with utilities to supply natural gas for electric power plants and, notwithstanding national gas shortage, was a contractual breach for which utilities were entitled to recover damages against supplier, and (2) utilities harmed by reason of supplier's breach of its contractual obligation to deliver natural gas to utilities for electric power plants were entitled to respective damage awards against supplier of $89,984,003 and $46,410,925 together with prejudgment legal interest.

Affirmed.

C. Murphy Moss, Jr., Lemle, Kelleher, Kohlmeyer, Dennery, Hunley, Moss & Frilot, New Orleans, W. DeVier Pierson, Pierson, Semmes and Finley, Washington, D.C., John R. Hutcherson, Brunini, Grantham, Grower & Hewes, Jackson, Miss., for United Gas Pipe Line Co.

Charles W. Lane, III, John W. Haygood, R. Patrick Vance, Jones, Walker, Waechter, Poitevent, Carrere & Denegre, New Orleans, Clayton L. Orn, Anderson, Brown, Orn & Jones, Houston, Tex., William C. Nelson, New Orleans, for New Orleans Public Service, Inc.

Donald R. Mintz, Constance Charles Willems, Ellis B. Murov, Pia Conte, McGlinchey, Stafford, Mintz, Cellini & Lang, New Orleans, for City of New Orleans and Blake G. Arata et al.

Andrew P. Carter, Kenneth P. Carter, Terrence G. O'Brien, Monroe & Lemann, New Orleans, for Louisiana Power & Light Co.

Stephen M. Hackerman, Baker & Botts, Houston, Tex., Gene W. Lafitte, Frederick W. Bradley, Liskow & Lewis, New Orleans, for Pennzoil Co.

Marshall B. Brinkley, Gen. Counsel, Louisiana Public Service Com'n, Baton Rouge, Michael R. Fontham, Wayne J. Lee, Paul L. Zimmering, Stephen G. Bullock, Noel J. Darce, Stone, Pigman, Walther, Wittmann & Hutchinson, New Orleans, for Louisiana Public Service Com'n.

Before REDMANN, C.J., and KLEES and LOBRANO, JJ.

REDMANN, Chief Judge.

United Gas Pipe Line Company appeals from judgments for breach of contract damages in favor of Louisiana Power and Light Company for $40,309,142 and New Orleans Pub-

lic Service, Inc. (and the class of persons paying the latter's electric rates during the breach) for $44,403,106. LP & L and NOPSI were obliged by the contracts to buy, and United was obliged to supply to them, their requirements (or part-requirements) of natural gas for electric power plants over periods of up to 25 years. United raises many issues, including whether the trial judge should have been recused; whether the ratepayers have a right of action; whether some damages were wrongly awarded because not caused by its alleged breach; and whether prejudgment interest was wrongly awarded. United's principal argument is that a national gas shortage and governmental distribution orders reduced or excused its contractual delivery obligations, both because the contracts so provide in cases of gas shortage, governmental orders, or force majeure, and because of a variety of other defenses.

The plaintiffs appeal or answer United's appeal (in either case referred to as an appeal) seeking added amounts or items of damages. LP & L seeks judgment in tort against United (as does the class) and against its one-time corporate parent, Pennzoil Company (whose corporate relationship is detailed in *Louisiana Power & Light v. United Gas Pipe Line,* 493 So.2d 1149 (La. 1986)). LP & L also seeks deletion of the judgment's provision for deposit of its award into the trial court's registry until the court rules on a method of distribution to its customers.

We note the intervention on the side of LP & L by the Louisiana Public Service Commission, whose position is akin to that of an amicus curiae, seeking awards only for LP & L. We also note the City of New Orleans's anomalous claim of a right of action (presented in NOPSI's original petition) as the governmental rate-setting body for NOPSI. The briefs of the PSC and of the City and class, in addition to those of the contractual parties, have very much assisted this court in its review of the judgments appealed.

We conclude that the record supports the trial judge's factual conclusion that United did not prove its affirmative defenses for its conceded failure to deliver the contracted gas. United did not prove that, if it had not released gas reserves that it already had (and had acted with reasonable diligence to acquire additional available gas reserves to meet its already existing contractual commitments and had not further committed itself to new sales of gas), the shortage would still have occurred (or to what extent) on its interstate and New Orleans area intrastate pipelines. United did not prove that its actions did not cause its shortage and were not, at the least, a breach of its implied contractual obligations under its contracts to provide gas. We reason that the contractual impairment of deliveries clause does not purport to exonerate United from liability; that the governmental orders would not have been necessary as to United but for United's self-caused shortage; and that the force majeure clause is inapplicable because United did not prove that the shortage was not within its control. We increase the amounts of damages awarded for increased costs of fuel (and purchased electricity) and we add damages for part of the costs of conversion of the generators to oil-burning. We agree that pre-judgment, but not pre-damage, interest is allowable, with La.C.C. 2924 rates on pre-suit damages only from 1980, and in those senses we reduce the interest award. We delete the provision for deposit of LP & L's damages into court, because questions of rebate or rate reduction fall exclusively to the Louisiana Public Service Commission (or the New Orleans City Council, as to Algiers rates) rather than to any district court. We agree that no tort claim is available against United or Pennzoil.

It is undisputed that United did not supply the gas that, unless somehow excused, it was obliged to supply for LP & L's and NOPSI's power plants under the long-term contracts. United is therefore liable for the damages caused by its failure to deliver the contracted gas, unless it proves

that its delivery obligation is reduced or excused by one of its several defenses.

Essentially, all of United's defenses partake of the nature of impossibility of performance because of a nationwide gas shortage and federal commission and court orders adopted because of that shortage. Essentially, the trial court's response, which we deem not manifestly erroneous but supported by the evidence, is that United bound itself to perform its contracts with LP & L and NOPSI, and that United did not prove that it did perform those contracts reasonably and in good faith: did not prove that it acted reasonably, in view of its performance obligations, to acquire and maintain sufficient gas reserves to satisfy its contractual obligations. The trial court's reasoning is that United itself brought about its shortage, which therefore does not exonerate United from liability.

UNITED'S APPEAL

United's arguments on appeal can be grouped into five: (I) the trial judge should have been recused because he was a member of a plaintiff class who would directly participate in the proceeds of judgment; (II) the ratepayers have no right of action for contractual damages from breach of a contract to which they were not parties; (III) liability was imposed on United without any consideration of the effect of the well-recognized gas shortage of the 1970s on United's ability to serve its customers and without reasoned analysis of the prudence of United's management of its gas supplies; (IV) damages were awarded for reductions in deliveries brought about entirely by federal order rather than by United's shortage of gas; and (V) the award of prejudgment interest dating back to the initial claims of the plaintiffs in 1974 and the award of all costs against United were improper.

I. RECUSAL

We have no authority to consider United's argument that the trial judge, because a member of a plaintiff class

of electric ratepayers, should have been recused. Although United cites the later *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813, 106 S.Ct. 1580, 89 L.Ed. 2d 823 (1986), the question of recusal in this very case has already been decided, rightly or wrongly, by the Louisiana supreme court: "The motion to recuse is denied on the merits." *City of New Orleans v. United Gas Pipe Line Co.,* 407 So.2d 714 (La.1981). The courts of appeal have no jurisdiction to review decisions of the Louisiana supreme court. La. Const. (1974) art. 5 § 10(A).

II. RATEPAYERS' RIGHT OF ACTION

We also do not decide whether the trial court should have sustained the exception of no right of action aimed at the NOPSI ratepayers, represented by several individuals and the City of New Orleans and the State of Louisiana. The first petition for damages was filed on behalf of the ratepayers and NOPSI together. NOPSI does not complain of sharing its recovery with the ratepayers, and United does not show any post-trail burden resulting from the arguably improper maintenance of the ratepayers' right of action. Also because it is of no concern to United, we change from January 1, 1973 to April 1, 1971, as the class requests, the trial judge's erroneous specification in the judgment of the date from which all electric ratepayers constitute the plaintiff class.

III. THE GAS SHORTAGE AS EXONERATION

That gas in ample quantity was unavailable from 1970 or so is not gainsaid. Beginning in 1968 and continuing through the 1970s, nationwide gas reserves declined as usage exceeded additions. But the shortage did not produce the results United claims by its many defenses, some of which overlap (as do this opinion's discussions).

III(a). INDUSTRY CONDITIONS AND UNITED'S ACTIONS

United's basic contention is that it did seek to perform, reasonably and in good faith, its contractual commitments;

that its purportedly imprudent or improvident management decisions were in fact reasonable and blameless, given the conditions existing at the time and the knowledge available at the time, including the expectations regarding the size and accessibility of underground reserves of natural gas. The genuine shortage of natural gas during the 1970s in Louisiana and throughout the nation, United claims, was unforeseeable and beyond the control of any individual pipeline company.

The trial court concluded that United's management of its gas supplies, including releases, acquisitions and sales, was imprudent and constituted the sole cause of its shortage. United claims that the trial court's evaluation of United's conduct was flawed because the court did not identify what was imprudent, based its findings on a purely retrospective analysis, and ignored the practices and expectations of the pipeline industry.

United claims that its expectations about the future availability of natural gas were reasonable and consistent with industry expectations; that it had no reason to believe in the period of 1960-66 that it faced a possible shortage. United asserts that it first became aware of possible peak-day shortages in 1969, and that its maintenance of its gas reserve inventory was reasonable and responsive to changing supply and market conditions.

United contends that it could not reasonably maintain the reserves it had because its contracts obliged it to take certain proportions of production annually or else pay for them, and that increasingly high levels of penalty payments for failure to take the contracted gas, caused by its inability to increase sales meaningfully until 1965, coupled with the continual increase in proved reserves in take-or-pay fields boding yet higher penalties, made it impossible for United to maintain existing reserves or make major new gas acquisitions for its interstate system until after 1965. In late 1965 and early 1966, as its system-

wide oversupply problems were in the process of being resolved, United contends it recommenced the acquiring of major new reserves.

United asserts that it was not until 1970, when it began to experience a sudden unavailability of new reserves, combined with continued delays in the construction of an ambitious offshore project and unforeseen downward revisions of estimates of its remaining reserves, that United realized that it would not be able to get sufficient new reserves to avoid some system-wide curtailments.

Another element contributing to United's predicament was that customers varied their level of takes during the year, at differing percentages of their maximum contract levels. The ratio of actual deliveries to the maximum contract limit is known as the annual load factor. The load factor of United's pipeline customers increased from 81% in 1965 to 94% in 1969. United's power plant customers also increased their load factors. United claims that the increases within existing maximum daily quantities under contracts were not predicted by customers or by United. According to United, new or enlarged commitments entered into after Jan. 1, 1968, account for less than 1% of total sales (excluding sales by facilities transferred to Pennzoil) during 1968-1970, and, by comparison with increasing load factors and other problems (increased sales on prior contracts were 14% of total sales), new sales were not, as the trial judge had found, a significant factor in its ultimate curtailment of deliveries.

In short, United contends that when considered in light of the problems it had to address, the information available to it at the time, and the accepted industry custom and practice, United's business decisions regarding the management of its gas supplies were reasonable and designed to ensure adequate supplies for United's customers.

We conclude, as amplified in the discussion below of United's more particularized defenses, that United's ac-

tions, however reasonable in other contexts, were not reasonable in the context of firm requirements contracts, because they did not constitute a reasonable effort to perform those contracts, especially in their implied obligations to have and maintain, or to acquire, at whatever cost, the gas necessary to fulfill the explicit delivery obligations.

On its New Orleans intrastate line, which supplied LP & L's Ninemile Point plant and NOPSI, for example, in the years 1962 through 1969, United released massive reserves of gas under contract. These releases were the result of United's contractual attempts (some allowing the producer the right to cancel United's rights) to avoid costly and escalating penalty payments, under "take or pay" contracts, for failure to take gas as United had contracted to do. By these releases, United lost reserves of some 2,063 billion cubic feet (Bcf) between 1962 and 1969 (and in 1967 shifted another 269 Bcf to an interstate system) from its New Orleans intrastate line. Annual sales from that pipeline in 1968 and 1969 were about 150 Bcf. The released reserves would have provided gas at that rate for over 13 years. (NOPSI's claim covers only about five years. While LP & L's Ninemile contract extended some 17 years at determinable prices, the delivery obligation actually decreased from 100% of requirements for the existing three generators to a third of requirements for those plus a planned fourth, once the fourth began operation. This decrease reduced the contractual daily maximum from 125,000 to 80,000 thousand cubic feet (Mcf). 17 years of reduced delivery would have roughly equalled 13 years of the original delivery.) The primary reason gas was not provided to Ninemile and NOPSI—the reason there was a "shortage"—was that United released those reserves notwithstanding its contractual obligations to supply gas.

The releases of those reserves (over half to Humble Oil as a result of an "omnibus agreement" of October 1, 1962) had business considerations as their purpose, and in that sense may well be described as reasonable. United's con-

tract for one of the largest fields enabled the producer to cancel if United did not take 25% of the field's production capacity for two years, and United did not take that quantity despite a price reduction aimed at increased consumption. Other contracts included "take or pay" provisions that obliged United to pay for specified minimums based on reserves even if not taken. Those provisions cost United $754,702 in 1960 and $6,776,068 in 1961 (and were expected to cost more as additional reserves in the contracted fields were discovered). United argues that its releases of reserves were reasonable responses to problems such as these. One may well accept that reserve releases were reasonable for United's purposes, but the releases, and the intrastate system shortage they caused, simply were not beyond United's control—as is required for the applicability of the contract's force majeure provision and the Civil Code's impossibility defense.

United's conversion of the New Orleans intrastate system into part of the interstate system (by injecting interstate gas), United argues plausibly, was more beneficial than harmful to intrastate system customers in that the gas that had been still attached to the former intrastate system (after the releases) was used in that lower-pressure ("locked-in") system only, which also received additional gas from the higher-pressure remainder of the interstate system. Also plausible is that United's sales to new intrastate system customers would, by themselves, not have created any problem for old customers (had the releases not occurred).

Even so, United's efforts as a whole to deal with (to escape) increasing costs of performance do not constitute good faith performance of its obligations, explicit and implicit, under its gas delivery contracts.

Thousands of times greater by absolute count, although less dramatic in proportion to usage, were the releases affecting United's interstate system, which served LP &

L's Sterlington plant near Monroe. That system's annual usage was about 1,300 to 1,500 billion cubic feet between 1960 and 1968, with a growth trend of over 3% a year and with a total usage during that period of about 12,454 Bcf. During that period United released almost 4,590 Bcf while adding only about 4,083 Bcf. Thus, over that nine-year period, that system suffered a continuing and increasing decline of reserves of over 1,300 Bcf a year from usage plus a slight further decline because additions to reserves were more than offset by releases of reserves. Had reserves simply been maintained at the 1960 level, United could have met its delivery obligations under its contracts for well beyond another nine years. LP & L's Sterlington contract only ran about eight years from the first curtailment. The record shows that there was no gas shortage in the early 1960s, and the trial judge's conclusion was therefore reasonable that United could have acquired additional reserves that, coupled with the reserves it released, would have maintained its reserve position and its ability to fulfill its contractual obligations over the lives of the contracts at issue. United does show that take-or-pay costs and other considerations prompted its business decisions, but increased costs to perform do not excuse nonperformance of contracts. In perspective, penalty prepayments for gas of $7,000,000 a year (or their balance of $15.3 million by 1963 or even $21.3 million by 1965) to assure ability to comply with its contracts, although truly a substantial amount of money, are not so excessive a "prepayment [of] working capital" (as the Federal Power Commission deemed them) as to justify nonperformance by an enterprise whose annual sales of 1,300,000,000 thousand cubic feet of gas, if all sold at a minimum price of $.175 per Mcf (its 1956 contract prices for LP & L were from $.175 to .745) would bring annual gross income of $227,500,000.

III(b). CONTRACT CONSTRUCTION

United argues (and the trial court agreed) that the contracts authorize certain curtailments, and that those curtailments would therefore not constitute a breach of the contracts. United argues that the trial court erred, however, by improperly identifying the circumstances authorizing curtailments and by finding that those circumstances were not present.

In particular, United argues that the "impairment of deliveries" clause should operate to allow curtailments without liability if a shortage exists, provided only that the shortage was not brought about through United's bad faith. The trial court ruled that in addition to there being a shortage, the shortage has to be the result of force majeure and United has to have "prorated its gas supplies between its customers in the order of priorities enumerated," before the impairment of deliveries clause would reduce or suspend United's delivery obligations. United argues that its curtailment priorities differed from those enumerated only because federal commission curtailment orders required curtailment priorities as mandated under the Natural Gas Act and that those orders superseded contract priorities because of the contracts' "duly constituted authorities" clause. Furthermore, United claims that the impairment of deliveries clause is not dependent on the "force majeure" clause, but is intended to be operative with respect to any system-wide shortages that would impair deliveries. Finally, United argues that the trial court erred in determining and applying the appropriate fault standard under the impairment of deliveries clause.

Impairment of Deliveries

Except for a 1974 amendment of the LP & L Sterlington plant contract that preserved LP & L's rights theretofore and is not of concern thereafter, the impairment of

deliveries clauses in the contracts were similar in substance to that here reproduced:

> "Buyer specifically recognizes the fact that Seller delivers gas to gas utilities for resale to domestic consumers and to public utility power plants for generation of electricity which is sold to domestic consumers and to other industrial consumers. In the event a shortage of gas renders Seller unable to supply the full gas requirements of all its consumers, then it is mutually agreed that the gas requirements of gas utilities selling gas to domestic consumers shall first be supplied by Seller and next the gas requirements of public utility power plants (including plant of Buyer) using gas for generation of electricity which is sold to domestic consumers, shall be supplied, and if Seller does not have sufficient gas to supply all of the requirements of said power plants, then said requirements shall be supplied ratably. The remaining available gas supply shall be prorated by Seller among its other consumers."

(The earlier Sterlington contract provided that "requirements of gas utilities selling gas to domestic consumers and . . . power plants using gas for generation of electricity . . . sold to domestic consumers shall first be supplied . . ., and the remaining available gas shall be prorated by Seller among its other consumers.")

United complains that the trial judge erred in construing the impairment of deliveries clauses as excusing delivery only if prevented by force majeure and then only if the clauses' priorities are followed. (An overlapping defense, discussed below, is that supervening federal orders set other priorities.)

United argues that the contracts contain entirely separate clauses on force majeure, to which the impairment of deliveries clause makes no reference. Most persuasive is that, during contract negotiations, United refused LP

& L's request to expressly limit the impairment of deliveries clause to force majeure conditions.

We agree that the impairment clause was intended to apply in all situations, and not only in force majeure conditions. Any shortage, for any reason, triggers operation of the impairment clause. For example, a former president of United testified that United would prorate deliveries in accordance with the impairment clause in case of a shortage clearly caused by a United employee's negligence. It appears to us indisputable that the impairment clause in such a situation would entitle the power plants to gas before "other consumers" (save domestic consumers).

The universal applicability of the impairment clause in cases of shortage does not, however, mean universal nonliability in cases of shortage. If every shortage excuses delivery obligations, the force majeure clause becomes meaningless. The contract to supply requirements becomes instead a contract to sell whatever is available.

The impairment of deliveries clause simply does not purport to address the question of whether a "shortage" reduces or eliminates United's contractual obligations. All that the impairment clauses in United's gas sales contracts say is that, in case of shortage, gas will go first to domestic gas users, then to domestic electricity users (through power plants), and then to other users. As the contractual characterizations buyer and seller indicate, United contracted not merely to transport gas over its pipelines, but to sell as well as deliver gas to LP & L and NOPSI.

The general rule of contract law is that contracts are enforceable and "have the effect of laws on those who have formed them," requiring their performance "with good faith." La.C.C. 1901 (1870). These contracts expressly made firm delivery commitments (unlike some industry contracts for "interruptible" delivery). The impairment of deliveries clauses therefore cannot be construed to mean that these gas contracts are simply not

enforceable whenever, despite its contractual agreement to supply power plant requirements, United does not have sufficient gas to perform them. Those clauses cannot be construed to excuse nondelivery in the case of a shortage that United could have avoided by reasonable foresight and good faith performance of the implied obligation to maintain (or acquire) sufficient quantities of gas to meet LP & L's and NOPSI's contractual entitlements. The LP & L Sterlington and NOPSI contracts both represented that United "has a supply of gas available for delivery to Buyer and is willing to sell and deliver . . . in the quantities as hereinafter provided."

We find no manifest error in the trial judge's finding that United did not exercise the reasonable foresight that good faith performance of its contracts required. To the contrary, the evidence is that, for business reasons aimed not at performance of its contracts but at saving costs, United released substantial reserves, which would have met then-current needs for several years, and did not acquire others at a time when at least some could have been acquired, and increased delivery commitments by additional sales despite declining reserves. We repeat that it was United's burden to prove its defenses, and United's proof does not demonstrate error in the trial judge's basic conclusion that, on both its interstate and intrastate pipelines, the exercise by United of reasonable foresight, in an effort at good faith performance of the contractual obligations it had already undertaken, long before the national gas shortage, would have enabled United to perform these contracts.

Force Majeure

The contracts also contained force majeure clauses, which suspended the obligations of a party when "rendered unable wholly or in part by force majeure to carry out its obligations. . . ." The contracts define force majeure as

"acts of God, strikes, lockouts or other industrial disturbances, acts of public enemy, wars, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts, arrests and restraints of governments and people, civil disturbances, explosions, breakage or accident to machinery or lines of pipe, the necessity for making repairs or alterations to machinery or lines of pipe, freezing of wells or lines of pipe, partial or entire failure of wells, and any other causes, whether of the kind herein enumerated or otherwise, not within the control of the party claiming suspension and which by the exercise of due diligence such party is unable to prevent or overcome. . . ."

The trial judge's factual conclusion, reasonably supported by the record, was that by the exercise of due diligence, in not releasing reserves, in acquiring reserves when it could have done so, and in not committing itself to further deliveries by added sales atop its preexisting contractual obligations, United could have prevented the shortage that its own actions caused. In such a factual situation, the force majeure clauses by their own definition do not apply and therefore did not suspend United's obligations.

Duly Constituted Authorities

The contracts also contained "duly constituted authorities" clauses: "This agreement is especially made subject to all present or future valid rules, regulations or orders of any commission or regulatory body having jurisdiction."

There is only one essential thing that must be said about the federal orders adopted to cope with the shortages of gas that developed on United's interstate and its Louisiana intrastate pipelines. The essential thing is that those orders did not expropriate any of United's gas or otherwise prevent United from using whatever gas it had to make de-

liveries to its customers. Those orders are not the cause of United's failure to meet its contractual delivery obligations to its customers, including LP & L and NOPSI. Those orders did no more than establish, because United could not supply all of its customers, a priority among its customers in entitlement to the gas that United did have.

United argues persuasively that the priorities established by the federal orders superseded the priorities established by the contractual "impairment of deliveries" clause. That argument affords United no escape from liability, however, because the trial judge's reasonably supported factual conclusion is that there would have been no shortage at all, and no reason for any impairment of deliveries according to either federal or contractual priorities, had United rendered the performance over the preceding years to which its earlier contracts obliged it.

III(c). FEDERAL INTEREST

United argues, as an argument apart from the duly constituted authorities contractual argument immediately above, that there is a federal interest that curtailments be uniform, nondiscriminatory, and in accordance with the objectives of the Natural Gas Act; that state law breach of contract liability is preempted by that interest (embodied in federal orders and tariffs), except, at most, in case of a pipeline's fault determined by federal standards of willful misconduct or reckless disregard of contract obligations.

The trial court concluded that federal curtailment orders and tariffs would not exculpate United from contractual liability for curtailments in the instant cases because United's shortage "was induced by the unrealized expectations and imprudent decisions of United and its management." United argues that the fault standard for determining whether exculpation lies under United's tariff and Commission orders is a federal fault standard, and

that the federal standard is willful misconduct or reckless disregard of the pipeline's service obligations.

United does not cite any authority establishing this separate "federal interest" argument. We conclude that it is inconsistent with the expressions of cases like *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 96 S.Ct. 1978, 48 L.Ed.2d 643 (1976); *International Paper Co. v. Federal Power Com'n*, 476 F.2d 121 (5 Cir. 1973); *Monsanto Co. v. Federal Power Com'n*, 463 F.2d 799 (D.C.Cir.1972); and *Texasgulf, Inc. v. United Gas Pipe Line Co.*, 610 F.Supp. 1329 (D.C.D.C.1985). These cases support the view that, notwithstanding that federal orders or tariffs may override any state law liability akin to strict liability or liability without fault, breaches of contract not only by willful misconduct, but also by negligence or lack of due diligence, are governed by state law standards. This defense seems to be no more than a restatement of the "duly constituted authorities" clause defense discussed earlier, and we deem it equally insufficient to avoid United's liability.

III(d). LOUISIANA CODE DEFENSES

United also argues that the trial judge erred in rejecting its separate defenses, under the Louisiana Civil Code, of fortuitous event or irresistible force, failure of cause, error as to motive, and implied condition.

Fortuitous Event

United contends that the nationwide gas shortage was a "fortuitous event or irresistible force" within C.C. 1933(2) (1870). United cites cases of performance excused by flood (*Viterbo v. Friedlander*, 120 U.S. 707, 7 S.Ct. 962, 30 L.Ed. 776 (1887) and very heavy rainfall (*Davis v. Tillman*, 370 So.2d 1323 (La.App. 2 Cir. 1979)). But those were not cases in which, for example, a contractor was held not liable for the failure of a flood-wall or roof because of flood or rain—that is, was exonerated by the occurrence of the risks that his contract undertook to protect against.

United's contracts undertook to provide gas requirements over specified periods of many years and, by necessary implication, to do what was necessary to have the gas to be able to provide it. Had United done the necessary, there would have been no "fortuitous" shortage on its lines here involved. United's fortuitous event or irresistible force defense, C.C. 1933(2) (if applicable despite United's arguably "active" breach, C.C. 1931, by release of reserves), is not different in substance or in result from its contractual force majeure defense.

Lack or Failure of Cause; Error; Condition

United also argues that there was a lack or failure of cause in the contracts in question and therefore they can have no effect; that the error of the parties in assuming the continued availability of natural gas was an error as to the principal cause, thereby vitiating consent to the contracts; and that the availability of gas was at least an implied condition of the contracts.

United argues that civil law "cause," C.C. 1893 (1870) (largely analogous to common law consideration), for United's obligation to deliver LP & L's and NOPSI's requirements was lacking or failed. United cites art. 1897's declaration that a contract is without cause "when the consideration for making it was something which, in the contemplation of the parties, was thereafter expected to exist or take place, and which did not take place or exist." Art. 1897 itself exemplifies its meaning: "A gift in consideration of a future marriage is void by this rule if the marriage does not take place." The record suggests that United, in failing to put itself into a position of ability to perform its long-term contracts, may have relied on a "contemplation" that gas would always be available; but it does not suggest that LP & L and NOPSI, in obtaining firm 20-year contracts for requirements, relied on that contemplation. That is not the tenor of the contracts. United did not contract only that, as long as gas were

freely available, it would transport it through its pipelines to LP & L and NOPSI. United's argument from art. 1897 would transform United's obligation from one to supply requirements into one to supply what it might have available, and that was not the intent of the contracts. The utility companies did not commit themselves to buy the contracted requirements exclusively from United for 20 years for the "principal cause" that gas was assumed to be readily available, nor in exchange for a conditional obligation that United would ~~sell if~~ gas were available. The utilities committed themselves to buy exclusively from United for the described contract prices in exchange for United's commitment that it would have and deliver gas. The utilities' commitment was the cause for United's obligation (not conditioned on the availability of gas), just as United's commitment was the cause for the utilities' obligation. The contracts were ordinary requirements contracts that are not invalid for lack or failure of cause or consideration.

IV. CAUSATION OF CERTAIN DAMAGES

IV(a). FEDERAL ORDERS

United argues that the major part of the reductions in deliveries for which damages were awarded was caused by federal order eliminating the power plant preference of the contractual clause on curtailment of deliveries, rather than by United's shortage of gas. United claims that orders of the federal government required United to take gas that it actually had and deliver it to other customers. In January 1973, FPC Opinion No. 647 in United's curtailment case ordered United to immediately eliminate the power plant preference from its curtailment tariff because of the nationwide gas shortage. As a consequence, United argues that 80% of NOPSI's requirements and 50% of LP & L's requirements fell to the lowest curtailment category and United could not legally reinstate the power plant preference. Accordingly, United claims it is not liable for

alternative fuel costs caused by the federal abolition of the power plant preference because those costs were not the immediate and direct result of United's alleged breach of contract. United contends that even with the shortage, most of plaintiffs' damages would not have been incurred if the FPC had not eliminated the power plant preference. Furthermore, United argues that the FPC and federal court orders abolishing the power plant preference constituted a fortuitous event or irresistible force under C.C. 1933(2), which prevented United from supplying gas. In addition, United asserts that the FPC and federal court orders preempt state court damage awards for curtailments resulting from abolition of the power plant preference. United therefore argues that NOPSI's and LP & L's damages should be reduced by the amount attributable to the elimination of the power plant preference.

Much of this argument, to repeat, overlaps earlier arguments. As we have analyzed it earlier, the curtailment clause did not exonerate United of liability in case of shortage, but merely provided a priority of distribution that would cause other customers to suffer the damages rather than power plants. Federal orders eliminating the power plant preference may be characterized as causing the power plants to be the damaged plaintiffs, rather than other customers, irrespective of the extent to which United's shortage may have contributed to the federal commission's orders. But some customers were, inevitably, bound to be damaged by United's failure to perform its contractual obligations to procure and have sufficient gas to comply with its commitments. For that reason, we cannot conclude that the federal orders alone caused the damage, nor that United was without precedent "fault" within C.C. 1933(3) if the federal orders were deemed a fortuitous event or irresistible force.

Nor can we deem the damages from United's breach not "contemplated" by the contract, C.C. 1934(1), or not the "direct and immediate result" of the breach, C.C.

1934(2) (a limit on damages from bad faith breach and, *a fortiori,* on damages from simple breach). Our analysis is that the contract obliged delivery and the failure to deliver inescapably caused the damages awarded. Those damages were, in our opinion, unavoidably contemplated by the parties at the time of the contract. Similarly, the federal orders, although pertinent to whether the failure of delivery constituted a breach, do not negate the obvious conclusion that the failure to deliver directly caused the damages awarded.

We therefore find no error in the trial court's rejection of the federal orders as a defense.

IV(b). OTHER DAMAGES

United claims that in addition to the award of alternative fuel damages for costs directly attributable to the FPC's elimination of the power plant preference, the trial court erred, first, in awarding damages for that portion of United's curtailments that were caused by the nationwide gas shortage, rather than by any fault of United; second, in awarding damages for alternative fuel costs at prices in excess of those reasonably contemplated by the parties at the time that pertinent contracts were executed; and third, in awarding damages to LP & L for increased maintenance and increased operating costs.

The first disputed award we deem sufficiently treated in discussing the arguments from the national gas shortage.

As to the second, we agree that the parties may not have expected a cost so high for replacement fuel, but they inescapably contemplated that failure to deliver the contracted fuel would necessitate (or at least justify) acquiring fuel elsewhere at market prices at the time of the breach. That the market was higher than foreseen does not mean that the contract is unenforceable, nor that its breach should not render the nonperformer liable for the

contemplated result of the breach. See Litvinoff, *Obligations,* II, § 192 (Louisiana Civil Law Treatise, vol. 7), reviewing the Louisiana and French "traditional doctrine [that] the distinction between foreseen and unforeseen damages merely relates to the cause and not to the amount or quantum of the damages." (Litvinoff notes that arguably contrary modern French decisions treat losses of luggage containing "expensive jewels, or unusual lace, or even a valuable manuscript, which are not habitually carried in such a manner.")

As to the third disputed award, United's expert agreed that maintenance and operating expenses increase when burning oil instead of gas. United argues, however, that LP & L did not prove the amount of the increase in these expenses attributable to United's failure to deliver gas, and United therefore seeks reversal of the awards for these items. The trial judge's awards adopted the figures provided by United's proposed findings of facts. United's proposals were that, by eliminating damages "for periods when oil burns were not the result of United's curtailments," maintenance cost increase would be $208,532 (when "based on actual oil usage") and operating cost increase would be $289,676 (also eliminating "salary costs for personnel who were not engaged in burning oil"). The trial judge evidently relied upon the testimony of United's expert Nathaniel Hughes, whose career included 35 years with the Tennessee Valley Authority, ending as chief executive officer of its power department. These awards against United are therefore supported by the record. (We hereinafter consider the argument in LP & L's appeal that these awards were inadequate.)

V. COSTS AND PREJUDGMENT INTEREST

United argues that the trial court erred in its award of costs and prejudgment interest to the plaintiffs.

V(a). COSTS

As to costs, United argues that, in view of the complexity of the cases and the disposition of the parties' claims, the trial court should not have assessed all costs against United; rather, each party should have borne its own costs.

In part, we agree. La.C.C.P. 1920 provides:

> "Unless the judgment provides otherwise, costs shall be paid by the party cast. . . .
>
> "Except as otherwise provided by law, the court may render judgment for costs, or any part thereof, against any party, as it may consider equitable."

United was indeed the "party cast," in respect to the majority of the claims (if not of the majority of the amount in each). But as to some unsuccessful claims LP & L and NOPSI must be counted as the "party cast," and should bear the costs attributable to those claims and to their contribution to the 42,000-page transcript. We see no equitable basis to make United pay the costs reasonably attributable to unsuccessful claims against it. We grant some relief to United in our decree, in a rough-justice apportionment considering all claims.

V(b). PREJUDGMENT INTEREST

Against prejudgment interest, United argues: (1) C.C. 1935 and 1938 and the Louisiana decisions limit prejudgment interest to cases where the object of performance is the payment of money; (2) prejudgment interest should not be awarded from judicial demand because the amounts of damages were not ascertainable at that time; (3) prejudgment interest should in no case have been awarded from judicial demand because demand was made before some of the damages awarded were incurred; and (4) prejudgment interest should not have been awarded at the escalating rates provided by amendments of C.C. 2924 subsequent to the 1974 judicial demands in these cases.

(1) Interest on Damages for Breach of Nonmonetary Obligation

Entirely independent of the meaning of C.C. 1935 and 1938, one may conclude, with United, from the nature of interest as money, that a contractual obligation to deliver gas cannot bear interest as such. One may further conclude that, as shown by art. 1934, damages from the breach of such an obligation are measured, instead, by the creditor's losses, including loss of profit.

Art. 1934 nevertheless provides, in cases of breach of a nonmonetary obligation, a monetary obligation to pay damages. Art. 1934(3) measures damages for breach of a nonmonetary obligation in terms of "pecuniary loss, or the deprivation of pecuniary gain." We agree with United that this monetary obligation arising from breach is not an explicit contractual obligation to pay money; that it is not (as United especially argues, citing Litvinoff, *op. cit,* II § 179) a transformation of the explicit contractual obligation to deliver gas. We further agree with Professor Litvinoff, however, as United's opponents emphasize, that "the obligation to pay damages 'perpetuates' the contract, . . . [and] is owed by virtue of the contract . . . [wherefore] such an obligation also binds the surety. . . ." The question before us at this point is whether this monetary obligation, not explicitly stated in the contract but nonetheless contractual in origin, bears interest.

Art. 1935

United argues not only that the obligation to deliver gas does not bear interest, but that C.C. 1935 (1870) limits interest to (the breach of express contractual) obligations to pay money. That argument begs our question by reading art. 1935 backwards. The article declares, in substance, that in all cases damages for breach of monetary obligations are interest; it does not declare that in all cases interest is damages for breach of (express contractual) monetary obligations. It limits claims for breach of (ex-

press contractual) monetary obligations to interest; it does not limit interest to such claims. Art. 1935 (1870) reads:

> "The damages due for delay in the performance of an obligation to pay money are called interest. The creditor is entitled to these damages without proving any loss, and whatever loss he may have suffered he can recover no more."

The context of art. 1935 is set by art. 1934's measure of damages from breach of nonmonetary obligations, declared to be the loss sustained and the profit denied (with modifications). Art. 1935's intent, to substitute interest for those damages, is thus even more clear from that context. Art. 1935 does not support United's position.

Art. 1938

United makes a similar argument from C.C. 1938 (1970)'s provision that "All debts bear interest . . . from the time they become due, unless otherwise stipulated." United argues that only (explicit contractual) monetary obligations bear interest, citing law dictionary definitions of debt as a sum of money due by express agreement. The Louisiana Civil Code does not so limit its concept of debt. Arts. 2131-2138 (1870) show the breadth of its concept:

> "Art. 2131. By payment is meant, not only the delivery of a sum of money, when such is the obligation of the contract, but the performance of that which the parties respectively undertook, whether it be to give or to do.
>
> "Art. 2132. He who is bound to do, or not to do, or to give, is indifferently called the obligor, or the debtor; and he to whom the obligation is made is in like manner without distinction called the obligee or the creditor.
>
> "Art. 2133. Every payment presupposes a debt. . . ."

(See also art. 3556, subds. (20) and (21), equating obligee with creditor and obligor with debtor.)

Art. 2131 shows that, under the Louisiana Civil Code, payment includes performance of nonmonetary obligations; and art. 2133 shows that such a performance "presupposes a debt." Together these articles show, as do arts. 2132 and 3556 in identifying debtor with obligor and creditor with obligee, that "debt" is as broad in meaning as "obligation" is, under the Louisiana Civil Code.

Our conclusion is that art. 1938's provision that debts bear interest from the time they become due is applicable to debts owed as damages for breach of a nonmonetary contractual obligation, unless some other law prevents its application.

Louisiana Decisions

United relies on *Sugar Field Oil Co. v. Carter,* 214 La. 586, 38 So.2d 249 (1948), and *Quinn Construction Co. v. Savoie,* 207 So.2d 229 (La.App. 4 Cir.1968), *cert. denied* 252 La. 117, 209 So.2d 42 (1968). *Sugar Field* explains its refusal of prejudgment interest in a quantum meruit case thus:

> "The plaintiff prayed for interest from date of judicial demand. The recovery in this suit is predicated on quantum meruit. It is, therefore, an unliquidated claim. Under Article 554 of the Code of Practice [1870] 'interest at the rate of five per cent shall be allowed on all *debts* from the time they become due, unless otherwise stipulated'. (Emphasis ours.) It is true that interest is permissible from date of judicial demand in all ex delicto suits but this is purely statutory—see Act No. 206 of 1916, § 1. In this suit the district judge correctly allowed interest from the date of judgment. On that date the claim had become certain and liquidated by reason of the judgment. *Connette v. Wright,* 154 La. 1081, 1090, 98 So. 674 [1924]."

If *Sugar Field* is not directly in point because an action in quantum meruit, United argues, its reasoning that interest was not recoverable because the claim was not liquidated is nevertheless controlling.

Quinn, supra, applied *Sugar Field's* reasoning in a claim by a contractor against a fired subcontractor for the contractor's excess cost of completing the subcontract. *Quinn* added that an unliquidated claim "cannot become absolutely ascertainable until fixed and determined by the court in its judgment." 207 So.2d at 234. A claim for excess cost of completion is essentially a claim for damages for breach of contract, and *Quinn* may therefore be deemed supportive of United's position.

The supreme court's latest decision in this area is *Alexander v. Burroughs Corp.,* 359 So.2d 607 (La.1978). *Alexander* is a bad faith redhibition case, and it (like the quantum meruit case of *Sugar Field*) may therefore be deemed not directly controlling. It does, nevertheless, point out the problem faced by a Louisiana court in deciding whether prejudgment interest should be awarded. *Alexander* observes:

> "The decisions involving interest on sums recovered by suit are naturally myriad and because of their great number, if for no other reason, inconsistent. There is, however, a thread of consistency among the cases. Article 554 of the Louisiana Code of Practice of 1825 provided that interest should not run on accounts or unliquidated claims, but was repealed by La.Acts. 1839, No. 53 § 1. This Court once commented,
>
> > " 'We have uniformly held that, since the passage of that act, all sums due on contracts bear interest from judicial demand, even where none has been stipulated, and the demand is unliquidated.' *Sullivan v. Williams,* 2 La. Ann. 876, 878 (1847).
>
> See also *Petrie v. Wofford,* 3 La.Ann. 562 (1848); *Calhoun v. Louisiana Materials Co.,* 206 So.2d 147, 151-

52 (La.App. 4th Cir.1968), writ denied, 251 La. 1050, 208 So.2d 324; and *Friede v. Myles Salt Co.*, 177 So. 105, 108 (Orl.La.App.1937)." 359 So.2d 613.

Calhoun was a suit by an employee for a portion of the employer's net profits, as provided by the employment contract. The court of appeal amended the judgment to grant interest from the date each year the payment was due, rather than only from judicial demand, reasoning "interest is recoverable on claims arising ex contractu from the time they become due, whether they are liquidated or unliquidated," citing *Friede*.

Friede alone of the cases *Alexander* cites gives an extended analysis of the problem. Itself an action for professional services, *Friede* notes that its plaintiff's entitlement "must be determined on a quantum meruit basis." 177 So. at 107. The court nevertheless awarded interest from the date of plaintiff's bill—that is, even before judicial demand. The court reasoned:

> "Counsel for plaintiff argues that legal interest should have been allowed from the time at which the debt became due. . . . This argument is based on article 554 of the Code of Practice [1870] and on article 1938 of the Civil Code [1870]. But counsel for defendant maintain that the claim, until judgment was rendered, was an unliquidated one, and that, therefore, interest should be allowed only from judicial demand.
>
> "We note that prior to 1839, interest was not allowed on accounts or unliquidated claims. Until that time, article 554 of the Code of Practice of 1825 provided that: 'No interest shall be allowed on accounts or unliquidated claims.' We deem it significant that by Act No. 53 of 1839 that provision was repealed. Now, apparently as a result of Act No. 181 of 1852, the article reads as follows: 'Interest at the rate of five per cent. shall be allowed on all debts from the time they become due, unless otherwise stipulated.

"The Civil Code provision on the subject has sustained a similarly significant alteration. Article 1932 of the Code of 1825 provided that: 'In contracts, which do not stipulate for the payment of interest, it is due from the time the debtor is put in default for the payment of the principal, and is to be calculated on whatsoever sum shall be found by the judgment to have been due at the time of the default.'

"However, that article (1932) of the former Code has now become article 1938 of our present Civil Code, which reads as follows: 'All debts shall bear interest at the rate of five per centum per annum from the time they become due, unless otherwise stipulated.'

"It is obvious that both changes indicate an intention that interest shall be allowed on unliquidated, as well as on liquidated, claims, and that interest shall commence to run at the time the debt becomes due, regardless of putting in default.

"Act No. 106 of 1916, providing 'that legal interest shall, hereafter, attach from date of judicial demand, on all judgments, sounding in damages, "ex delicto"' has no application, for, by its own terms, it controls only '* * * judgments, sounding in damages, "ex delicto."' " 177 So. at 108.

In *Pease v. Gatti,* 205 La. 949, 18 So.2d 511, 513 (1944), quoting that same passage from *Friede,* the supreme court awarded interest on an unliquidated damage claim from the time the damage was incurred, years before judicial demand.

Primarily because of *Alexander,* we conclude that prejudgment interest is not prohibited by the Louisiana decisions. With tens of millions of dollars of interest at stake, however, we do discuss several other cases that are cited by the parties or that cite *Alexander.*

Drs. Brown, Carter & Sauls v. Sauls, 418 So.2d 706 (La.App. 3 Cir.1982), *cert. denied* 422 So.2d 425 (La.1982), also cited by United, reasoned that interest did not run until 15 days after finality of judgment on an obligation to pay for stock, when the stock was to be delivered and paid for 15 days after finality of judgment. This reasoning is consistent with the basic rule that interest runs from the due date of the principal obligation, but does not otherwise affect the present case.

City Stores Co. v. Gervais F. Favrot Co., Inc., 359 So.2d 1031, 1035 (La.App. 4 Cir. 1978), affirmed interest from judgment on an award to a cost-plus contractor, noting many complicating factors and observing that it was only after having "considered these matters and rendered an award that a sum certain could be reached." Although the court did not use the word, it seems fair to characterize the court's reasoning as denying earlier interest on the ground that the amount due was not earlier ascertainable.

Land and Offshore Co. v. Martin, 469 So.2d 1177, 1186 (La.App. 3 Cir.1985), was a suit for damages for breach of contract. The court of appeal ruled, citing *Alexander,* that "the [trial] court should not have limited the interest to post-judgment interest. All sums due on a contract bear interest at least from the time of judicial demand." The damages were more easily ascertainable than those of LP & L and NOPSI, but they were nevertheless damages that had to be ascertained, and not mere return of purchase price or similar fixed dollar amount.

Magnolia Construction Co., Inc. v. Causey, 421 So.2d 990, 994 (La.App. 3 Cir. 1982), *cert. denied* 426 So.2d 177 (La. 1983), awarded interest from judicial demand on a judgment for damages (loss of profit) from a contractor's breach of a building subcontract by hiring another subcontractor. The court reasoned:

> "Counsel for the [subcontractor] cites *Alexander* . . . and urges that interest on the judgment should run

from the date of active breach of the contract. *Alexander* is a redhibition case. Although Justice Dixon cites Louisiana Civil Code Article 1932, which provides that damages are due from the moment of active violation, he also states that the Supreme Court has consistently said that all sums due on contracts bear interest from time of judicial demand. [Citing cases cited by *Alexander*.] Interest therefore should run from the date of judicial demand."

White v. Rimmer & Garrett, 360 So.2d 914, 919 (La.App. 3 Cir. 1978), also involved damages for breach of a building subcontract. This case differed from *Quinn* (cited by United) in that firing of the subcontractor was held improper and the subcontractor recovered the profits he would have made from full performance. But the court of appeal reversed the trial court's award of interest from judicial demand, observing:

> "In the recent case of *Alexander* . . . , the court, although concluding that in matters of contract . . . interest . . . on a damage award is due from the moment of an active violation of a contract or from the time the debtor has been put in default when the breach is passive, determined that interest in such cases is awardable only from the date the amount of the award is ascertainable."

We note at this point that the third circuit in *White* in 1978 and the fourth circuit in *Quinn* in 1968 both refused prejudgment interest on the ground that the damages were not ascertainable. Yet the third circuit in 1982 awarded prejudgment interest on comparable subcontract breach damages, in *Magnolia Construction, supra.*

Messina v. Koch Industries, Inc., 267 So.2d 221 (La.App. 4 Cir.1972), *aff'd* 283 So.2d 204 (La.1973), decided before *Alexander*, was a suit for money due on a contract to supply labor, equipment, and material for a specified por-

tion of a building contract, with material and labor to be charged at cost plus 10%. The trial court awarded interest from the last date that plaintiff performed under the contract, and defendant contended that interest should be allowed only from judicial demand. Rejecting that argument, the court of appeal reasoned:

> "Interest is an item of damages due for delay in the performance of an obligation to pay money. C.C. art. 1935. Debts bear interest from the time that the obligation to pay money arises. C.C. art. 1938. . . . [P]ayment . . . became due when the obligation to pay arose, not when judicial demand for payment was made."

National Roofing & Siding Co. v. Gros, 433 So.2d 403 (La.App. 4 Cir.1983), citing *Calhoun, supra,* allowed interest from the time of completion, rather than only from judicial demand (as the trial court had awarded), on an award to a building contractor for contract price less cost of completion.

Lone Star Industries v. American Chemical, 461 So.2d 1063, 1069 (La.App. 4 Cir.1984) *cert. denied* 465 So.2d 738 (La. 1985), a suit for the price of oil in which both the price per barrel and the number of barrels were disputed, reasoned: "Interest on the disputed, or unliquidated, portion of the contract price is due from the time the amount became ascertainable, that is from the date of the judgment."

See also *Louisiana Power & Light v. United Gas Pipe Line,* 642 F.Supp. 781, 810 (E.D.La.1986), which awarded pre-judgment interest on LP & L's damages from breach of contract (overcharging) by United on deliveries from the mid-1970s under the 1968 Sterlington contract.

In reviewing these several decisions on prejudgment interest, we echo the supreme court's observation in *Alexander* that such decisions "are naturally myriad and

because of their great number, if for no other reason, inconsistent. There is, however, a thread of consistency among the cases." 359 So.2d at 613.

Alexander itself confirms ascertainability as that thread, as the test to determine whether a debt bears interest only from judgment or, instead, from its due date (at least from judicial demand, a "putting in default," which renders due the damages from a passive breach of contract, C.C. 1933). The fundamental rule is that of C.C. 1938. Every (contractual) debt bears legal interest from its due date unless otherwise stipulated by the parties. A debt may be due before its amount is ascertained. Interest runs from the due date only if the amount is ascertainable. Interest may not run, not even from judicial demand, on a debt whose amount is not ascertainable except by a court's award (such as for reasonable attorney's fees as in *Alexander,* or for damages for breaching a contract for "intellectual enjoyment ... or other legal gratification," C.C. 1934(3) (1870)).

One may well disagree with the individual result in some of the cases discussed above, without disagreeing with their basic reasoning. Their basic reasoning is that of *Alexander:* an amount that is not ascertainable bears interest from judgment, and an amount that is ascertainable bears interest from due date, which ordinarily is at least from judicial demand. The degree of difficulty of ascertaining ascertainable damages is not an obstacle to interest's running from their due date.

"Damages are due 'from the moment' of an active violation of a contract (C.C.1932) and from 'the time that the debtor has been put in default' when the breach has been passive. C.C.1933." *Alexander,* 359 So.2d at 613. Thus the obligation to pay the monetary damages for breach of the nonmonetary obligation to deliver gas arose, as to pre-lawsuit breaches, at the time that judicial demand put United in default, at the latest.

(2) and (3) Some Damages Not Ascertainable or Not Suffered as of Judicial Demand

Damages for alternate fuel costs already expended were both ascertainable and had already been suffered when suit was filed. United's monetary obligation to pay those damages was thus due, at the latest, upon judicial demand.

On the other hand, some damages, as for costs of alternate fuel that was yet to be required, were not ascertainable when suit was filed. No new requirements contract with another supplier fixed the alternate fuel costs over the life of the breached contract. United's obligation to pay the excess alternate fuel cost months or years later would depend, for ascertainment of its amount, on factors such as future market prices. We therefore agree that those costs were not ascertainable on the day of judicial demand, and that LP & L and NOPSI are therefore not entitled to interest on those costs from original judicial demand (even if otherwise due from that time).

That LP & L and NOPSI had not yet paid for the alternate fuel for later months and years also affects the date from which interest runs. If future costs were ascertainable (as if, e.g., a new requirements contract would supply all fuel), the excess cost could be discounted to value at judicial demand and judgment awarded for that value plus interest from demand. In this case, however, future costs were not ascertainable on the day of judicial demand nor until they were in fact incurred. Interest cannot fairly be allowed on the undiscounted value of those future costs for months or years before the damages they represent were actually sustained.

We conclude that the fair computation of interest requires that the damages for the excess alternate fuel costs (i.e., their excess over the contract prices for power-equivalent quantities) be deemed to become due only at the time that those costs were incurred. The parties agree that a basic measure of this element of damages is rea-

sonably approximated by LP & L's and NOPSI's own monthly fuel adjustment charges to their customers (although certain reductions from those charges are hereafter discussed in treating LP & L's appeal). That measure provides a means of approximating monthly excess alternate fuel costs and interest will run on all of them from the end of the month in which incurred. Interest will similarly run on other elements of damage from the time those damages were sustained and their cost ascertainable.

(4) Rate of Prejudgment Interest

The Louisiana Civil Code contained (until its partial revision by La.Acts 1984 No. 331) specification of the legal interest rate in both arts. 1938 and 2924.

Art. 1938 (1870) provided simply, "All debts shall bear interest at the rate of five per centum per annum from the time they become due, unless otherwise stipulated."

Art. 2924 (as amended, Acts 1908 No. 68) provided:

> "Interest is either legal or conventional. Legal interest is fixed at the following rates, to wit:
>
> "At five per cent on all sums which are the object of a judicial demand. Whence this is called judicial interest;
>
> "And on sums discounted at banks at the rate established by their charters."

Over the course of this litigation the rate of legal interest was increased in three steps to 12% per annum. United argues that the rate of 5%, as provided by C.C. 1938 at the time of the contracts in question, continued to apply because of C.C. 1940:

> "In cases where no conventional interest is stipulated, the legal interest, at the time the contract was made, shall be recovered, although the rate may have been subsequently changed by law."

The trial judge (in a proceeding testing the sufficiency of United's suspensive appeal bond) held that the rate increased as the law was changed, as now provided by C.C. 2924 though not by art. 1938.

The interest rates in both Arts. 1938 and 2924 were raised to 7% by La.Acts 1970 No. 315, to 10% by Acts 1980 No. 402, and to 12% by Acts 1981 No. 574. Art. 1938 was not otherwise changed. Art. 2924 was additionally changed, however, in the 1980 and later amendments, by the insertion of clauses making the new rates applicable to pending lawsuits from the effective dates of the amendments. As amended by Acts 1984 No. 458, Art. 2924 reads:

> "A. Interest is either legal or conventional.
>
> "B. (1) Legal interest is fixed at the following rates, to wit:
>
> > "(a) At twelve percent per annum on all sums which are the object of a judicial demand, whence this is called judicial interest; and
>
> "(b) On sums discounted at banks at the rate established by their charters.
>
> "(2) The rate of judicial interest resulting from a lawsuit pending or filed during the indicated periods shall be as follows:
>
> > "(a) Prior to September 12, 1980, the rate shall be seven percent per annum.
> >
> > "(b) On and after September 12, 1980, until September 11, 1981, the rate shall be ten percent per annum.
> >
> > "(c) On and after September 11, 1981, the rate shall be twelve percent per annum."

United contends that art. 2924 applies to noncontractual cases, and that this contract case is governed by arts. 1938 and 1940.

Appellees cite art. 1936's declaration that "the rate of both [legal and conventional interest] is fixed by law in the chapter on loans on interest," which is art. 2924's chapter.

The parties cite several cases, but none addresses United's argument. *Dyna International Corp. v. Mashburn*, 397 So.2d 1080 (La.App. 4 Cir.1981), awarded interest under art. 2924's schedule on the price of merchandise. *LeJeune v. J.W. Cappel Trust*, 405 So.2d 647 (La.App. 3 Cir.1981), and *Todd Shipyards Corporation v. Turbine Service, Inc.*, 574 F.Supp. 53 (E.D.La. 1983), both awarded interest under art. 2924's schedule on damages for breach of contract. But those cases do not discuss art. 1940.

We conclude, from the Code's several provisions cited, that art. 1938 applies to all obligations to pay money (save as delictual damages, governed by La.R.S. 13:4203), making interest payable from their due date (and providing legal interest unless a contract stipulates otherwise); art. 1936 places the fixing of rates in art. 2924; art. 2924 fixes legal interest rates for all debts that become "the object of a judicial demand," including "pending" lawsuits; art. 1940 may provide, for contractual debts that have not become the object of a judicial demand, that they shall bear interest at the rate at the time of contracting. We conclude that, in view of the explicit language of art. 2924 after its amendment effective September 12, 1980, art. 1940 cannot continue to apply to a debt for damages for breach of contract after that debt has been made the object of a judicial demand. Art. 1940 may still have application to a contractual obligation up until the time suit is brought upon the obligation. Until the 1980 amendment of art. 2924 to make the changing rates applicable to pending lawsuits, however, the earlier change in the rate of legal interest from 5% to 7% did not apply to these pending lawsuits, because the amending Act did not so provide. *Succession of Drake*, 359 So.2d 249 (La.App. 2 Cir.1978). On the other hand, it cannot fairly be contended that

damages that had not yet been sustained, at the time of the increase to 7%, remained governed by the 5% rate; by the same reasoning that refuses "pre-damage" interest, we hold that the legal interest rate at the time that *post-demand* damages were sustained applies to those post-demand damages. The result is that interest is payable, as to all damages sustained before original judicial demand, at 5% until September 12, 1980, and thereafter at 10% and 12% in accord with art. 2924's schedule; and, as to all damages sustained after judicial demand (which occurred after the 1970 amendment of art. 2924), at 7% until September 12, 1980, and thereafter at 10% and 12% in accord with art. 2924's schedule.

LP & L'S APPEAL

LP & L's appeal argues that (I) its delictual claim against United and Pennzoil should not have been dismissed; (II) the damages awarded for breach of contract were inadequate; and (III) the trial judge's order to deposit LP & L's damages with the court for its further orders is unauthorized by law.

I. LP & L'S DELICTUAL CLAIMS

LP & L claims, against United and United's onetime sole or controlling shareholder Pennzoil, that their acts damaged LP & L and that they are therefore liable for that damage under the delict (tort) rule of La. C.C. 2315:

> "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."

LP & L also relies on C.C. 2324 (1870):

> "He who causes another person to do an unlawful act, or assists or encourages in the commission of it, is answerable, in solido, with that person, for the damage caused by such act."

The record demonstrates that United's acts, abetted if not controlled by Pennzoil, damaged LP & L. LP & L cites (among other cases) *Borden, Inc. v. Howard Trucking Co., Inc.,* 454 So.2d 1081, 1096 (La.1983), for the rule that "a party can incur liability in tort, notwithstanding a contractual relationship . . . where the act causing the damage constitutes both a breach and legal fault." *Howard Trucking* awarded over $60,000, against a trucker and its tort liability insurer, for loss of methanol production during repair time attributable to the trucker's negligent damaging of a compressor it had contracted to transport for plaintiff. If scholars may dispute whether that kind of consequential damages should be allowed in any case (as *Howard Trucking's* four-three decision demonstrates), the rule seems quite beyond dispute that the existence of a contract does not confer tort immunity.

As to United, however, the legal cause of LP & L's damages was not some act that "constitute[d] both a breach [of contract] and legal fault," both a breach of the contract's "effect of laws" between the parties and also a breach of duty under general law. The cause of LP & L's damages was, simply, that United failed to perform its contractual obligations toward LP & L. United did not breach some general-law duty such as to drive safely, or to safely locate or pressurize or otherwise maintain its gas lines so as to avoid injury to third persons. If LP & L had had no contract with United, United would have had no obligation under general law (other than safety rules) towards LP & L to so deal with United's gas and pipelines as not to injure LP & L. LP & L's damage was the result not of any breach by United of a general legal duty, but of the breach of duties arising exclusively from contracts. United's conduct was not a delict, and United is not liable in tort to LP & L.

LP & L argues that Pennzoil is liable in tort for inducing United to breach its contract with LP & L (or for tortious

interference with that contract), although Pennzoil itself had no contractual obligation towards LP & L.

The Louisiana supreme court has held that an action cannot be maintained for inducing a third person to break his or her contract. *Kline v. Eubanks,* 109 La. 241, 33 So. 211, 213 (1902); *B.J. Wolf & Sons v. New Orleans Tailor-Made Pants Co.,* 113 La. 388, 37 So. 2 (1904). It has repeated that rule in *Moulin v. Monteleone,* 165 La. 169, 115 So. 447, 448 (1927); *Cust v. Item Co.,* 200 La. 515, 8 So.2d 361, 363 (1942). See also *Forcum-James v. Duke Transportation,* 231 La. 953, 93 So. 2d 228 (1957); and *PPG Industries, Inc. v. Bean Dredging,* 447 So.2d 1058 (La.1984). There have been indications that the court might reconsider that rule. *Sanborn v. Oceanic Contractors,* 448 So.2d 91, 95, n. 5 (La.1984). Those indications do not put it within the authority of a court of appeal, however, to refuse to follow a supreme court decision. Whatever the theoretical merit of Restatement 2d Torts §766, we are obliged to follow *Kline v. Eubanks* and its progeny. We therefore affirm the rejection of LP & L's claim against Pennzoil.

II. AMOUNTS AND ITEMS OF DAMAGE

LP & L argues that the trial judge erred in the amount of his award for excess fuel costs; in his denial of damages for the cost of conversion of generators from gas-burning to oil-burning; and in the amounts of his awards for increased maintenance and operation costs caused by oil-burning.

II(a). ALTERNATE FUEL COSTS

In evaluating damages for the excess cost of alternate fuel, an essential premise is that the breached contracts are requirements contracts. United was obliged to furnish LP & L with whatever gas LP & L required at Sterlington and one third of whatever gas LP & L required at Ninemile (within specified daily maximums and, for Ninemile,

an hourly maximum of one 20th of the daily maximum). This essential premise seems at times unacknowledged in the trial judge's calculation of the award for excess cost of alternate fuel, apparently because obscured by the use of an indirect measurement based on the fuel adjustment clause charges made by LP & L to its area customers. As hereafter explained, the parties attempted to approximate damages for the excess cost of fuel by use of LP & L's fuel adjustment charges to its area customers—an amount at least sometimes wrongly calculated by LP & L vis-á-vis its area customers, though not necessarily wrongly calculated vis-á-vis United, as the excess amount LP & L itself expended for alternate fuels.

A precise measurement of the amount of gas that would have constituted LP & L's requirements (within contract maximums), if United had not breached, and thus a precise measure of LP & L's excess cost of replacement fuel, is impossible. The principal contributor to this impossibility is LP & L's operation of its power plants in harmony with the power plants of LP & L's corporate siblings (including NOPSI, plaintiff in the consolidated case) in the integrated Middle South Utilities Company system, in a plan called economic dispatch. By economic dispatch, Middle South coordinates electricity production by its subordinate corporate electricity producers, so as to meet their combined demand at the lowest possible cost. Middle South does so by continually analyzing the costs of production and, through a central system operator at Pine Bluff, Arkansas, drawing each hour more electricity from the cheaper producers and less from the more expensive. On the basis of hourly calculations, each producer's cheapest electricity is by an accounting allocated to that producer for its own area customers; any producer's surplus of cheaper electricity is "sold" (for fuel cost alone) to sibling producers and any deficiency is made up by cheaper electricity from sibling producers. (Middle South also sells electricity to unrelated utilities, allocating the highest-cost electricity to

these "off-system" sales.) Presumably, had United continued to supply LP & L with gas that would produce electricity cheaper than that of LP & L's sibling producers, LP & L would have produced more electricity with United's relatively cheap gas (within the maximums of the requirements contracts with United) than it did with the more expensive alternate fuels. There are other factors, such as the relative heat equivalencies of and the efficiencies in burning gas and oil, that are measureable. But, to repeat, there is no way to measure precisely (1) the fuel cost of the amount of electricity that would have been produced by burning United's gas had United not breached, versus (2) the fuel cost of that same amount of electricity produced by burning alternate fuels or by buying electricity from corporate siblings (also, LP & L emphasizes, at the under-true-cost price of fuel cost alone).

LP & L therefore asked the trial court to make an award, as the best available basic approximation of LP & L's damages from the excess cost of alternate fuel owing to United's failure to deliver gas in accordance with its contracts, on the basis of the increases in LP & L's area customers' billings under the "fuel adjustment clause" authorized by governmental rate-controllers. United agrees, in its reply brief, that from April 1975 through December 1981 this "was a reasonably accurate reflection of increases experienced by LP & L in the cost of fuel used to generate electric energy for LP & L's area customers." United argued, however, that LP & L's calculation of that basic approximation at $78,523,963 required adjustments, some of which the trial judge made (including those for mathematical errors) while accepting the basic approximation, thereby reducing the award to $39,810,934. LP & L complains that six of those adjustments were erroneous.

Adjustment 1: Sales to Other Utilities

In respect to the period before April 1975, the trial judge eliminated $5,129,369 excess fuel costs "incurred by

LP & L in generating energy for sale to other utilities," concluding that "some of these costs would have been incurred even if United had not curtailed and are therefore not a result of United's breach of contract. LP & L has recovered [these costs] from other utilities. . . ."

LP & L argues that United has had the benefit of under-cost replacement electricity from Middle South's economic dispatch system when LP & L's siblings produced electricity more cheaply than LP & L could (especially after April 1975), and ought not be heard to complain of the burden of that system from the occasions when LP & L sold to its siblings (and others) before April 1975. We agree. We assert at the outset, as fundamental to this discussion, that LP & L's "requirements" under its contracts with United included all its needs for producing electricity, irrespective of whether sold to other utilities or to its Louisiana "area customers."

United's basic argument on this point is simply that LP & L has collected these excess fuel costs for sales to other utilities twice—once by its fuel adjustment charges to its area customers and once by its charges to the other utilities. That is indeed the case, until April 1975. After April 1975, the Louisiana Public Service Commission no longer allowed the excess cost attributable to electricity sold to other utilities to be openly included in the fuel adjustment charges to LP & L's area customers.

That LP & L's area customers should not be charged for increased costs of fuel for LP & L's sales to other utilities (whether or not also paid by the other utilities) seems indisputable. It does not follow, however, that United's breach of LP & L's requirement contracts did not oblige United to pay for those increased costs of fuel.

The trial judge erred in, in effect, so holding. As between United and LP & L, United was obliged to supply LP & L's requirements up to contractually-specified maximums, and failed to do so. The requirements contracts

did not deny LP & L the right to burn gas to produce electricity for sales to other utilities; and the charged-for replacement fuel for that purpose is not shown by United to have exceeded (equivalently) the contractual maximums, nor to have constituted by its quantity an abuse of the right to demand requirements within the contractual maximums.

We conclude that LP & L was entitled to recover as damages from United the excess costs attributable to sales to other utilities. LP & L's having charged its customers twice does not prevent it from recovering from United once.

The trial judge's finding that some of the costs before April 1975 "would have been incurred even if United had not curtailed" appears to relate to testimony of a United expert concerning electricity produced by oil-burning at Sterlington. In March 1975, of LP & L's total of 1,245,788 megawatt hours, LP & L's highest megawatt-hour cost was that for the generation by oil-burning at Sterlington. Oil-burning generated 3,668 megawatt hours that month, none of which was allocated to LP & L's area customers (who, to repeat, were allocated the cheapest electricity produced by LP & L), but all of which was included in calculating the area customers' fuel adjustment charges (as noted above). United's expert roundly reprehended LP & L (and the Louisiana Public Service Commission) for including the fuel-cost increases for sales to other utilities in its fuel adjustment charges to LP & L's area customers. One of that expert's declarations may have been the source of the trial judge's view that some costs would have been incurred even with no curtailment by United. That expert declared that LP & L's expert

> "doesn't know and I don't know . . . , even using his methodology, if United had delivered . . . enough gas to generate another 100,000 megawatt hours, I don't know that that 3,368 megawatt hours that was gen-

erated on oil at Sterlington wouldn't have been generated. I don't know that and he doesn't know that. But he still, you know, is suing United for it."

The expert's position, related to the fact that LP & L sometimes sold large amounts to sibling utilities and off the Middle South system, was that even a surfeit of gas would not assure one-for-one replacement of megawatts generated by oil-burning (and therefore lack of gas did not cause oil-burning). The expert argued that LP & L's government-authorized fuel adjustment charge against its area customers rewarded LP & L for generating higher-cost electricity, and the higher the cost the higher the reward: before April 1975, LP & L recovered, overtly and with PSC approval, twice the excess fuel cost of electricity sold to other utilities by charging both the utility and LP & L's area customers for that cost.

The material thrust of this argument by United, in the context of this action for damages for breach of contract, is that LP & L did not mitigate its damages. (That it was more profitable for LP & L not to do so is not material.) A failure to mitigate is not proven, however, by an expert's testifying "I don't know." The expert established the possibility of a profit motive for burning higher-priced oil even if a cheaper fuel were available: but United did not prove that a cheaper fuel was available. Certainly United, by its own breach, did not make a cheaper fuel available. United simply did not prove that LP & L did not mitigate its damages in this respect.

We therefore increase the award to LP & L by the $5,129,369 increased alternate fuel costs attributed to sales to other utilities.

Adjustment 2. Hourly Calculation of Damages

As noted above, LP & L submitted that its area customers' fuel adjustment clause charges were the best approximation it could make of its damages from the

increased cost of alternate fuel. LP & L had originally calculated those charges each month for the purpose of adding its added costs of fuel to its customers' base-rate monthly bills.

United attacks LP & L's calculations on the basis that they are defective as a calculation of the excess alternate fuel costs for electricity for LP & L's area customers (just as United argued as to Adjustment 1, above). United asserts that its own calculations of actual excess costs chargeable to LP & L's area customers, purportedly based on Middle South's hourly economic dispatch allocations and charges, show that LP & L's monthly calculations overcharged area customers by $14,874,170 between March 1976 and February 1980. The fundamental error of United's attack is that the question is not whether LP & L overcharged its customers, and how much, by its fuel adjustment calculations, but whether LP & L was damaged, and how much, by United's admitted failure to deliver United's requirements (or part requirements) of gas as it had firmly contracted to do.

In fixing the award to LP & L for its damages, nevertheless, the trial judge accepted United's arguments concerning the inappropriateness of the fuel adjustment charges passed on by LP & L to its area customers. He therefore reduced LP & L's calculation from the amount of its fuel adjustment charges by another $14,874,170, as United requested. He agreed with United that LP & L's excess alternate fuel costs from United's breach of its obligation to supply LP & L's requirements were more accurately calculable hourly rather than monthly and that LP & L's calculation on a monthly basis failed to distinguish between fuel LP & L would have burned regardless of curtailment and fuel burned as a result of curtailment. He concluded, using United's hourly calculations, that LP & L would have incurred $14,874,170 of these costs even if United had not curtailed.

We can agree that monthly calculations are not ideal, if only because the contracts set a daily maximum delivery obligation (and, at Ninemile, an hourly maximum of a 20th of the daily maximum). LP & L was certainly not entitled to overdraw the daily maximum on peak days because it had underdrawn it on other days of a month. But we cannot agree with the trial judge's first conclusion, namely that, because economic dispatch made hourly calculations, United's hourly calculations were more accurate than LP & L's monthly ones. (We note that, as United's expert testified, hourly variations from a 24th of the contract day's electricity usage are certain to occur, between still midnight and busy midday, perhaps somewhat moderated in winter but aggravated in summer by heating and cooling usage. Daily variations from a 30th of a month's usage would appear less drastic save on weekends and days of unseasonal climate. The error of monthly calculations would appear to be less than the error of hourly calculations for this reason.) Calculating hourly rather than monthly does not, in any case, explain the greater part of United's $14 million calculation.

There are three premises to United's hourly calculations that produce the difference in result from LP & L's monthly calculations and thereby the adjustment under discussion:

(1) the elimination of increased costs of electricity not allocated by Middle South's economic dispatch system to LP & L's area customers (notwithstanding that the requirements contracts included whatever gas LP & L needed for electricity);

(2) the treatment of United's contractual obligation to deliver at Ninemile "33-1/3% of the fuel requirements" as if it read "one half of the actual deliveries by Texaco" (which was bound by contract to supply the other two thirds of requirements, but after early 1979 did not); and

(3) the changing of a daily maximum delivery obligation (with an hourly maximum at Ninemile of one 20th thereof) into 24 hourly ones of one 24th thereof.

United's expert exemplified his calculation in the following testimony (with italicizing by this court of his premises that we deem mistaken):

> "This . . . illustrates the way in which you would calculate the fuel replacement costs in the event of a United curtailment when you analyze those replacement costs for each hour just as the [Middle South] system operator makes these allocations each hour, and I would like to start with . . . an hour in which the calculation shows the complete replacement of the entire United curtailment. In hour 16, 4 p.m., the total load of the LP & L system, the *area load* [for "area customers"] of LP & L is 2,920 megawatt hours. That is equivalent to the 3,000 mwh . . . that goes to *Louisiana area load.* When we started off at the cheapest sources—remember the cheapest sources available to LP & L go first to serve LP & L [area customer] load--there are 1700 mwh that are available from other gas sources. Texaco gas at Little Gypsy, Texaco gas at Ninemile 5, could be sometime LGP [Louisiana Gas Purchasing, discussed hereafter] gas is cheaper. In any event, there are 1700 mwh served by the cheaper gas. . . . This [number] is for purposes of illustration, although it is based on a typical hour. Now, Texaco delivers in this hour to Ninemile units 1 through 4 . . . enough gas to generate 580 mwh and United delivers 70 mwh. Now, if you add that up [1700 + 580 + 70], you will see that you have got a total of 2350 mwh. You are obviously short of serving the *Louisiana area load.* In order to serve *that load,* you had to burn . . . the oil equivalent to 570 mwh . . . [to] come up with the total [*LP & L's area customers*] load of 2,920 mwh.

"We now have to determine what the alternate fuel costs were to replace the United curtailment and we do this in the same way that [LP & L's expert] did it for LP & L.

"*The United obligation is one-half the delivery to Ninemile units 1 through 4 by Texaco,* and obviously one-half of 580 is 290 mwh, but United, as we saw, delivered only 70 mwh of equivalent fuel. If we subtract the 70 from 290, clearly we have the need to replace 220 mwh that United was obligated to deliver. So the replaced curtailment with alternate fuels is 220 hours . . . that had to be replaced by LP & L with higher cost . . . fuel. . . .

"Now, if I can direct your attention to . . . hour 8[,] . . . an hour in which there was a United curtailment but no responsibility for alternative fuel costs. . . . The load in hour eight, that is 8 a.m., . . . is only 1,980 mwh. . . . These fluctuations in hourly load are typical of the daily fluctuation in load experienced by any utility. Now, again, we find that . . . there is low-cost gas available sufficient to generate 1,480 mwh to serve *the Louisiana area load.* Also, Texaco is delivering to Ninemile 1 through 4 the equivalent of 540 mwh. We can see that we have already exceeded *the Louisiana area load. 1480 plus 540 is 2,020 mwh, but the Louisiana area load is only 1,980 mwh, so that we already see that in this hour, 40 mwh generated by Texaco, the low-cost Texaco gas*[,] *is going off the LP & L system.* It is equivalent, it is part of this 1,000 mwh . . . going to the [Middle South] exchange.

"Clearly, given the fact that the way the energy is allocated with the cheapest energy going to the area load and the next cheapest or the next more expensive going off system, clearly *if this generation by Texaco gas* at $3 a mwh *already is in excess of*

the Louisiana power area load by 40 mwh, *this additional 70* [mwh from United gas] *at the more expensive $7.50 is also going to serve customers outside the Louisiana area load. If United had delivered every cubic foot of gas that it was obligated to deliver in that hour, that gas would not have gone to the Louisiana load. . . . Every additional cubic foot that United could have delivered would have gone to serve non-Louisiana* [i.e., non-LP & L area] *customers.*

And we can see that *the United obligation is one-half of Texaco's deliveries,* that is 270 mwh. [United] actually delivered 70, so if we are simply looking at curtailment, their curtailment was the equivalent of 200 mwh, *but the amount of that curtailment that was replaced was actually zero because no kwh generated with United gas could have possibly gone to the Louisiana area load.* Therefore, the cost of replacement is zero. . . .

"[In] hour 11, 11 a.m., the load is . . . 2,420 mwh. Of this total, 1,690 mwh of cheap gas . . . is provided. Texaco delivers 580 mwh and United once again . . . delivers 70 mwh, but this is still short of the *Louisiana area load* by 80 mwh and it is necessary for LP & L to burn oil equivalent to generation of 80 mwh in order to satisfy its *area load.* So, how do we calculate the cost of that curtailment.

"*The United obligation once again is one half of the Texaco delivery,* again half of 480 is 290 mwh. The actual deliveries by United were only 70, so United's curtailment is equivalent to 220 mwh. *However, in this case, the first 80 mwh of that curtailment,* had it been delivered, *would have gone to serve the Louisiana area load and then . . . anything in excess of that 80 mwh,* that is, the additional 140 to make up the 220 curtailment, *would have gone off system. . . . So it is only the 80 mwh that would actually have had to have*

been replaced [to supply LP & L' area customers] *that should count as the curtailment for which there was an incurrence of alternative fuel costs passed through to Louisiana customers.*"

Of the three previously noted premises of United's hourly calculations, as shown by that testimony, the first and most important is its exclusion of excess fuel costs allocated by Middle South's economic dispatch to other utilities. We repeat, again, that the requirements contracts between LP & L and United do not limit LP & L's use of gas to generation of electricity for its area customers. United's hourly calculation excludes from LP & L's damages any excess alternate fuel cost for electricity allocated to other utilities (always the highest excess alternate fuel cost, because of the Middle South economic dispatch). We have rejected this exclusion in Adjustment 1 and we reject it here as well. United was obliged by its contracts to supply whatever gas (within contract maximums) LP & L required for generating electricity, whether for its area customers or for other utilities.

The second premise of United's hourly calculation—that United's delivery obligation at Ninemile was half of Texaco's actual delivery—finds no support in the contract language. The language requires "33-1/3% of the fuel requirements" (not over 80,000 Mcf a day, nor over a 20th of that in any one hour). As long as Texaco was not itself curtailing deliveries of its very cheap gas (and the other third of requirements was met, including in part from United), United's contractual one-third of requirements would indeed approximate half of Texaco's actual delivery. But once Texaco itself began to curtail, that equivalency existed no longer. For example, in United's expert's "hour 8," *for the "Louisiana area load" alone,* Ninemile units 1 to 4 generated 1,980 mwh. The minimum "requirement," therefore, was fuel sufficient to generate 1,980 mwh. Texaco's 2/3 of that requirement would have been gas for

1,320 mwh (and United's 1/3 would have been gas for 660 mwh). Texaco was curtailing, however, and actually delivered gas for only 580 mwh instead of 1,320. United's "hourly calculation" calculates that United owed only half of the 580 mwh of fuel that Texaco delivered, rather than half of Texaco's contractual obligation of 2/3, which was 1,320 for the Louisiana area customers alone (ignoring other utilities, and ignoring that "requirements" might have been greater if Texaco gas could be burned instead of more expensive fuels). United's hourly calculation reduces United's clear contract obligation of (at least) 660 mwh of fuel to only 290 mwh of fuel. United's expert was clearly wrong in calculating damages on the basis that United owed no greater gas delivery at Ninemile than half of Texaco's actual delivery.

In respect to the third premise, we repeat that the contracts provided daily maximum delivery obligations (with the only hourly maximum being, at Ninemile, a 20th of a day's maximum). The significance of an hourly calculation itself, essentially, is that if in any hour LP & L's alternate fuel costs (including any cheaper-cost electricity produced by Middle South siblings) did not exceed what United's gas would have cost, not only is United's breach treated as causing LP & L no damage (as in the example's "hour 8") but, in addition, one 24th of United's delivery obligation for that day is treated as discharged. The latter treatment is unjustified under the terms of the contracts, which state daily maximum delivery obligations (or, at Ninemile, an hourly maximum of a 20th of a day's maximum), rather than an hourly maximum of a 24th of a day's maximimum. The contracts did oblige LP & L to take gas "in equal daily and hourly quantities as nearly as operating conditions will permit," but that contract wording recognizes that demands for electricity do vary among the hours of a day (e.g., between a summer midnight, when sleeping homeowners and closed businesses use less airconditioning and other machinery, and a summer midafternoon, when

airconditioning demands the most electricity and other machinery is more likely to be in use). The contracts only obliged LP & L to take gas at a uniform rate as operating conditions would permit, and United's hourly calculation errs in dividing its daily delivery obligation into 24 uniform hourly delivery obligations.

We summarize our conclusions on the "hourly calculations" adjustment: LP & L's monthly fuel adjustment clause charges to its area customers are not ideally precise calculations of the excess fuel costs portion of LP & L's damages, because monthly calculations would not account for any fuel usage in excess of the contracts' daily maximums (much less usage in any one hour in excess of a 20th of the daily maximum). United's hourly calculations, on the other hand, are entirely unacceptable because they limit "requirements" to requirements for area customers, they limit United's Ninemile delivery obligation to half of actual deliveries by Texaco during Texaco's curtailment, and they change daily maximums into 24 hourly maximums of one 24th of the daily maximum.

Our final conclusion on this point is that United's hourly calculations must be rejected and LP & L's monthly calculations accepted. LP & L's calculations reasonably approximate LP & L's damages from excess costs of alternate fuel purchases. The errors LP & L's monthly calculations may contain as summarizing of total excess alternate fuel costs chargeable to its area customers are not errors in summarizing LP & L's damages from the costs it had to pay. The charges to LP & L's area customers did not, after April 1975, include all excess costs of alternate fuels for electricity sold to other utilities although United's requirements contracts obligation included gas for that electricity, and therefore LP & L's basic approximation itself understates, to that extent, its damages. All factors considered, we conclude that LP & L's basic approximation should not be reduced by United's hourly calculations. We therefore increase the award to LP & L by $14,874,170.

Adjustment 3. Ninemile "Requirements" After Texaco Curtailed

The trial judge rejected LP & L's claim, to the extent of $10,819,212, of alleged excess costs of alternate fuel (including electricity generated elsewhere) to replace gas that United was obliged to but did not deliver to Ninemile units 1 through 4 after Texaco began to curtail its Ninemile deliveries in early 1979. The trial judge accepted United's position that its third-of-requirements delivery obligation at Ninemile was only one third of the fuel actually used during the period when both United and Texaco (together obliged to supply all requirements of those Ninemile units) were curtailing their deliveries. The trial judge points out that LP & L's hypothetical requirements for 1979, 1980 and 1981 are substantially greater than actual usage in 1977 and 1978, when Texaco was not curtailing.

LP & L argues that actual use is not a measure of fuel "requirements" under the circumstances. Again, Middle South's economic dispatch system plays a role: to the extent that burning higher-priced alternate fuels available at Ninemile produced electricity at a higher cost than that of a sibling utility or even of another LP & L plant, the system operator would not draw electricity from Ninemile. LP & L argues that, if Texaco had continued to deliver its Ninemile obligation, the Middle South system operator would have drawn very much more electricity from Ninemile, causing Ninemile to take a large measure of the Texaco contract maximums, because Texaco gas generated electricity from two to several times cheaper than other electricity generated by LP & L and its Middle South siblings with other fuels. (See, e.g., United's hourly calculation example, with Texaco gas costing $3 per mwh produced, United gas $7.50 and oil, always very high priced, $16. In 1979 to 1981, oil increased to $23 to $41.) A United expert agreed that LP & L's calculations of the amounts Texaco would have been called on to deliver, notwithstanding less usage in 1977 and 1978, were "pretty

close to what the actuality might have been had they operated" (although that expert would have used hourly calculations, as earlier described, instead of LP & L's monthly ones).

LP & L's calculation of this part of its fuel damage claim takes into consideration one half of the Texaco contract maximum (rather than, simply, the United contract maximum) because the Texaco maximum was relatively smaller than the United maximum and in practical effect also limited the United maximum. United's third had a daily maximum of 80,000 Mcf; Texaco's two-thirds had a daily equivalent maximum of only 142,000 Mcf. If the much cheaper Texaco gas had been available and LP & L had taken the 142,000 Mcf maximum as Texaco's two thirds, it could only have demanded half of that, or 71,000 Mcf, as United's one third, of LP & L's requirements for Ninemile 1 through 4. LP & L would presumably not have been able to demand the other 9,000 Mcf of the United's 80,000 contract maximum (because United was only obliged to deliver a third of requirements) unless LP & L were able to acquire an additional 18,000 Mcf equivalent atop Texaco's fixed-price maximum of 142,000. Thus the relatively lower Texaco maximums constituted, in times of high fuel costs, a practical maximum on United's obligations as well.

The ultimate question on this point is whether requirements are measured by what LP & L would have used in the absence of United's and Texaco's breaches, or by what LP & L did use in the presence of those breaches. One United expert observed:

> "It seemed to me that the fuel adjustment clause as it was applied was inappropriate . . . that there were a number of questions still unresolved; for example, . . . the calculation for the period in which Texaco was in curtailment based on the fuel burn. Now we thought it was unfair to introduce this extraneous

> consideration. . . . But . . . that is a legal issue to be resolved and if you resolve the issue one way, you get one kind of calculation. If you resolve it another way, you get another kind of result."

It was the trial judge's function to resolve that legal issue, of whether LP & L's damages are limited to excess costs of replacement fuel actually burned at the Ninemile units, or whether, to the contrary, damages may be recovered for the excess cost to replace fuel that LP & L shows, more probably than not, it would have required were there no breach.

We conclude that the proof does establish, as more probable than not, that if Texaco had not curtailed, Ninemile would have burned (and therefore required) a very large part of the Texaco maximums, as LP & L reasonably calculated—because neither LP & L nor its siblings could generate all of the electricity they required by burning other available fuels as cheaply as by burning Texaco gas. LP & L would equally have required, therefore, half of that Texaco quantity from United as United's third of requirements (well within contract maximums), to produce the electricity that LP & L would have produced at Ninemile for its own area customers and for its siblings. We add that this is not a claim for hypothetical lost profits but for actual losses. The electricity that the missing Texaco and United gas would have generated was in fact generated. Alternate fuels to produce that electricity were in fact burned, although at other generating units because fuel costs there were cheaper than those of Ninemile (resulting in a mitigation of LP & L's damages). This excess fuel cost damage to LP & L was real.

We therefore add to LP & L's award this $10,819,212.

Adjustment 4. Test Energy at Waterford

LP & L argues that the trial judge erred in deducting, from LP & L's basic approximation of total excess alter-

nate fuel costs from United's breach, the excess alternate fuel cost of $1,522,137 for fuel burned at LP & L's plant at Waterford to test its new generators. This argument is related to a part of the argument on Adjustment 3, that electricity not produced at Ninemile because of United's and Texaco's breaches had to be produced elsewhere to fill Ninemile's "requirements." Throughout the several adjustments to its excess fuel cost calculations, LP & L consistently argues that it has done the best it could to approximate its increased fuel costs by totalling those passed on to its area customers; and that this best-available approximation—which does not include in full all excess costs of fuel for electricity sold to other utilities—is not subject to individual adjustments because it is only an approximation. We have agreed with this point of view as to some of the adjustments, but we are unable to do so as to this one.

With United in default, certainly Ninemile's or Sterlington's "requirements" could have been made up in part by purchasing electricity from Waterford (as from other generators), in which case LP & L would recover, in effect, the excess cost of Waterford fuel. The Waterford test electricity did indeed flow to LP & L's areas customers or other purchasers, and in that sense helped to meet what might otherwise have been requirements of Ninemile and Sterlington.

If United had not defaulted, however, Waterford testing would still have occurred, using fuel at then-market price. (The fuel would not have been United's low-priced gas, because the contracts for Sterlington and Ninemile requirements did not entitle LP & L to gas for use elsewhere.)

Accordingly, whether United had defaulted or not, Waterford would have had the same excess cost of test fuel, notwithstanding that Waterford test electricity flowed to LP & L's purchasers and therefore reduced LP & L's

other "requirements." It therefore cannot fairly be said that United's breach caused the excess cost of fuel for testing at Waterford. Nor is United unjustly enriched by escaping responsibility for that part of its requirements obligation, for United did not owe requirements for Waterford testing.

We affirm the trial judge's elimination of this $1,522,137 excess cost of fuel from LP & L's calculation and award.

Adjustment 5. Louisiana Gas Purchasing Corporation Gas

The trial judge reduced LP & L's award by $4,987,006 because of LP & L's contract with its sibling utilities regarding a gas supply for Sterlington that LP & L acquired in August 1971. LP & L at that time entered a 20-year, fixed-price contract with Louisiana Gas Purchasing Corporation (at about twice the cost of United's contract price—though still cheaper than much replacement fuel—and at the further cost of laying a pipeline and agreeing to "take-or-pay" provisions). LP & L contracted with its siblings that they would take both burden and benefit of 65% of the electricity to be generated by LP & L's burning this gas at Sterlington: LP & L agreed to "sell" (and they always to "buy") 65% of the electricity generated with this gas. This electricity might be cheaper or dearer, from time to time, than other Sterlington generation. It would, therefore, under ordinary economic dispatch practice, have been allocated to LP & L's area customers when cheaper but to the sibling utilities when dearer. The trial judge treated this action, in effect, as a failure to mitigate damages properly because, as it turned out, this gas was cheaper over the years than other available fuels.

In our view, the critical fact is that LP & L did not give up this gas, did not give up a substantial supply of a replacement fuel that was cheaper than most other replacement fuels. LP & L burned all of this gas, at Sterlington. It also burned other, more expensive alternate

fuels, to meet its requirements at Sterlington. Its fuel requirements, we repeat once again, were not limited to fuel to generate electricity for its own "area customers" but included fuel for whatever electricity it generated for whatever customers (subject to contract maximums). And, to the extent that its requirements might from time to time have exceeded contract maximums, United was not entitled to have the benefit of the cheapest fuel that LP & L used in any event.

We add that LP & L's obligation to mitigate damages did not oblige it to invest in the substantial cost of a pipeline to bring the LGPC gas to Sterlington, nor to take the risk that later market conditions would leave it with a 20-year supply of higher-priced gas that it was obliged to take or pay for in increasing quantities. See *Unverzagt v. Young Builders, Inc.*, 252 La. 1091, 215 So.2d 823 (1968).

We therefore increase the award to LP & L by this $4,987,006.

Adjustment 6. Sterlington Damages after 1974

LP & L argues that a $225,000 reduction made by the trial judge is a partial duplication of the "hourly calculation" adjustment. LP & L asks correction only if we do not reject the hourly calculation. Because we did reject that calculation, this argument becomes moot.

II(b). CONVERSION COSTS

There is an inconsistency in awarding as damages the excess cost of oil burned as replacement fuel, and the increased maintenance and operating costs from using oil, while denying any recovery whatsoever for the cost of equipment to burn the oil. The trial judge awarded no damages for the $17,757,645 that LP & L spent in converting some generators at Ninemile and Sterlington to burn oil. There are difficulties in fixing an award, but it indeed appears that United's breach caused at least part of these damages at both Sterlington and Ninemile.

Sterlington

The 1956 Sterlington contract obliged United to provide, from 1958 to 1978, LP & L requirements for unit 5 and the "proposed new Unit No. 6," up to 50,000 Mcf a day. A contract mechanism provided for increasing the daily maximum and it was increased, in 1966, to 55,000 Mcf, and a 1967 "standby" contract gave LP & L another firm 16,000 Mcf, for a total maximum of 71,000 Mcf. The maximum was then reduced, however, to 30,000 Mcf for 1970 and 25,000 thereafter, by agreements on both contracts in 1969, when LP & L believed it could get cheaper gas elsewhere. As it turned out, LP & L could not get the other gas. The consequence was that LP & L was entitled to only 25,000 Mcf after 1970 instead of the 71,000 it had had under contract since 1967.

That reduced maximum, even at the 1970 level of 30,000 Mcf, was inadequate for the generating capacity of Sterlington. Atop that inadequacy came notification from United of potential peakday shortages and other gas supply problems in the future.

The Sterlington boilers (unlike those of Ninemile) were not capable of burning oil even for a few days at a time. LP & L therefore decided, in Summer 1970 (before actual curtailment by United began in Fall 1970), to provide a part-time oil-burning capability. This "Phase I" conversion was completed in 1971 at a cost of $2,238,268.

The evidence supports the trial judge's inference that this Phase I conversion (notwithstanding incidental usage during United's curtailment) was required by LP & L's having only a 25,000 Mcf daily gas supply, rather than by the danger of curtailment of even that 25,000 Mcf. We cannot say that the trial judge was wrong in rejecting this item of LP & L's damage claim.

United began curtailing in late 1970. Sterlington 6 was thereafter converted to full-time oil-burning capability in

1974 to mid-1976, at a cost of $2,481,409. The trial judge reasoned:

> "Even if United had not been in curtailment, the maximum deliveries by United under the Sterlington contract plus that available from other suppliers would not have been adequate for the Sterlington station in the 1970's. The Phase II conversion would have been necessary in any event."

We agree that this conversion would have been necessary in any event, but it would not have been necessary until two years later. Even if we were to award to LP & L nothing but interest on the costs expended in 1974-1976 that could have been postponed until 1976-1978 (ignoring that some part of the useful life of the oil burners was expended), two years at 12% would amount to 24% of the total cost.

The trial judge's ruling, moreover, has the effect of giving United credit for LP & L's cheapest means of generating substitute heat. United was entitled to have LP & L mitigate its damages by burning other fuel, but not by counting as United's substitute any gas that LP & L was unable to acquire, nor even the oil that LP & L was able to use with unit 5's part-time oil-burning capacity (the cost of which, the trial judge held and we affirmed above, was LP & L's sole responsibility). The most expensive substitute heat, by a correct accounting, was that that came from the full-time oil-burning by unit 6, because the true full cost of that heat inescapably includes some cost of the burning device supplied by the Phase II conversion. United's breach was a cause of the Phase II conversion at Sterlington, and some part of the cost of that conversion is part of the damage from that breach.

To award to LP & L the full cost of a permanent conversion in 1974-1976, with a life expectancy of perhaps 25 years, would unjustly enrich LP & L, for United's breach only endured until the end of its contract in 1978. Indeed,

United's expert testified that it would have been unreasonable to expend the cost of conversion if oil were to be burned for only two years or so. Evidence that gas again became available and used as Sterlington's fuel in the 1980s supports LP & L's argument, however, that it has not had and will not have the benefit of the oil-burning capacity of unit 6 for its useful life, and therefore should not have to pay for the full post-contract part of that life. There is also merit in LP & L's argument that United's breach at least caused LP & L to expend the cost of conversion (to the extent needed because of contract expiration) before it would otherwise have had to do so.

Thus to award none of this cost would be error, yet to award all is equally sure to be wrong. We are left with the necessity to make an apportionment. We consider that, after the United contract expired in 1978, LP & L had need for oil-burning, and that LP & L's need after contract expiration endured for much over half of the total time that the conversion fulfilled such a need, that is, over half of the actually used life of the equipment. On the other hand, LP & L had to pay for that need at least two years early. We deem it a reasonable apportionment of this Phase II cost to charge a third to United and two thirds to LP & L. We therefore increase LP & L's award by a third of this $2,481,409, or $827,136.

Ninemile

The 1968 Ninemile contracts with United and Texaco promised a 25-year firm supply of gas requirements for units 1 through 4 (although prices were negotiable for the last five years). United curtailed its deliveries from late 1970. Texaco did not curtail until 1979. Ninemile units 1 through 3, previously capable of part-time oil burning (four to five days at a time), were converted to full-time oil-burning capability between 1973 and 1977.

The trial judge reasoned:

"As pointed out by the Court in its discussion of Phase I and Phase II conversion of Sterlington Unit 6, the conversion of Ninemile Units 1-3 would have been necessary in any event. Furthermore, the Court is of the opinion that this conversion process was not within the contemplation of the parties at the time of the confection of the contract, or considered as a possible element of damages even if the contract was breached."

The Sterlington reasoning is not applicable to Ninemile. Sterlington had very inadequate daily maximums of gas under contract (reduced to 25,000 Mcf from 71,000) when United curtailed, and the contract was to expire in less than eight years. Ninemile, on the other hand, had contracts for its full requirements (with unreduced delivery maximums), under contracts that provided fixable prices through 1987 and negotiable prices through 1992.

The trial judge's ruling that conversion of Ninemile "would have been necessary in any event" may refer to the fact that Texaco's 1979 breach would have required it, or may be an acceptance of United's argument that federal orders would have prevented United's fulfilling its contractual obligations. In either case, we disagree. Texaco's 1979 breach did not cause a 1974 conversion. And we have already noted, and agreed with, the trial judge's rejection of United's federal orders defense, and we again reject that defense as embodied in the argument that conversion of Ninemile would have been necessary even if United had not curtailed. The necessity of conversion of some part of Ninemile's plant resulted from United's overall breach, just as the federal orders did. The ruling that conversion would have been necessary if United had not breached is clearly wrong.

Also wrong is the ruling that conversion from gas to oil was unforeseeable as a consequence of nondelivery of gas by United. United well understood that its contract

was to supply fuel to provide heat for boilers to provide steam to drive generators. As a matter of law, United had to foresee that, if it breached, LP & L would have to burn fuel from other sources for that purpose. As pointed out in treating United's appeal's "other damages" argument, above, the traditional doctrine is that unforeseeability relates to the cause and not the cost of the damages. It was patently foreseeable that, to operate the Ninemile boilers, some equivalent quantity of fuel—gas, oil or coal—would have to be burned. Equally evident was that conversion would be necessary to burn oil or coal. United was entitled to have Ninemile produce the heat for its boilers by the cheapest means available, but United was not entitled to have Ninemile cease operations. Conversion of some Ninemile units to oil-burning capability was, it is not disputed, the cheapest means available.

United is obliged to pay for the conversion of Ninemile 1 through 3, for that conversion was made necessary by United's breach alone, years before Texaco breached. We therefore amend the award to LP & L to include the $13,037,968 cost of the Ninemile conversion.

II(c). INCREASED OPERATION AND MAINTENANCE COSTS

As we noted in treating United's appeal, a United expert conceded that operating and maintenance costs are higher for generators fueled by oil than for those fueled by gas. We earlier upheld the trial judge's conclusion that United was liable for the increased costs of maintenance and operation, at least in the amounts that United's proposed findings of fact had provided.

The evidence on both items consists of an LP & L expert's factual and expert testimony and calculations and the attack thereon by a United expert.

Operation

LP & L calculated its added costs of operation from the salaries that it paid to specified operators during the

breach, multiplied by 1.5 to include LP & L's overhead factor. That calculation produced the claim of $1,648,841.

United's expert expected such documentation as staffing plans and job descriptions to justify the need for the additional operators. He also contended that LP & L was, to some amount indeterminable without full documentation, claiming a partial double recovery on this item, because LP & L also indirectly charged, as a fuel cost, some of the salaries of these operators who worked on the adjacent fuel storage facility for a related corporation (System Fuels Incorporated) that sold oil to LP & L. His strongest attack pointed out that there were extended periods of months and, literally, years in which no oil was burned in each of Ninemile units 1 to 3 and Sterlington 6; and that, as LP & L's witness had testified, the additional operators worked in other areas of the plant when not occupied in oil handling or oil storage.

We cannot say that the trial judge erred in rejecting the $1,648,841 claimed by LP & L and in awarding, instead, the $289,676 proposed by United.

Maintenance

LP & L claims $5,005,800, but the trial judge awarded only $208,532, as additional maintenance costs resulting from the use of oil as a fuel.

The same expert whose testimony was accepted by the trial judge to reduce the operating expense claim gave similar testimony regarding the maintenance claim.

LP & L's witness prepared total actual maintenance costs and estimated what costs would have been if only gas had been burned. The difference between the two is the amount of LP & L's claim. LP & L did not keep records of individual generator unit maintenance costs. The actual costs were for all units at a plant, e.g., at Ninemile, for units 1 through 5, although only units 1 through 3 ever burned oil. United's expert again attacked both lack

of documentation and the calculation method of this claim. Specifically, he objected to estimating the gas-only cost on the basis of the average of 1971 through 1974, with no correction for inflation. He showed that correction for inflation would have sharply reduced the difference between the actual maintenance costs and the corrected estimated costs.

We are again unable to conclude that the trial judge erred in accepting United's expert's testimony and the damage amount of $208,532 as proposed by United rather than the $5,005,800 claimed by LP & L.

III. DEPOSITING AWARD WITH COURT

The Louisiana Public Service commission, before 1975, authorized LP & L to bill LP & L's area customers an additional charge named a fuel cost adjustment, for the excess costs of fuel that LP & L burned to generate electricity not only for its area customers but for other utilities as well. Perhaps the trial judge felt strongly that the area customers might suffer a comparable inequity in respect to LP & L's recovery of those charges to the area customers in this case, if that recovery were left to the PSC to allocate (although its membership has changed meanwhile and that method had been changed by it in 1975). Perhaps for that reason, although no party requested it, the trial judge ordered the award deposited with the court for further proceedings by LP & L and the commission.

We agree with LP & L and the commission that the disposition of the award is a matter for the commission to decide. La. Const. art. 4 § 21(B) places regulatory power over utilities in the commission. This power includes ratemaking. R.S. 45:1163. Ratemaking includes fixing refunds. *Louisiana Power & Light Co. v. Louisiana Public Service Com'n,* 377 So.2d 1023 (La. 1979). Because there is no action in this case by the class of LP & L ratepayers, it is not governed by *City of New Orleans v. United Gas Pipe Line Co.,* 438 So.2d 264 (La.App. 4 Cir.1983), *cert.*

denied 442 So.2d 463 (La.1983), suggesting that a class's recovery may be deposited into court and holding that a regulatory commission may not intervene in the class action.

NOPSI'S AND THE CLASS'S APPEAL

NOPSI and the class of its electric ratepayers seek, atop the trial court's award of $44,403,106, $8,031,276 costs of conversion of generators to oil-burning and $34,457,304 and $6,728,180 for lost profits on hypothesized sales to other utilities and to its area customers. The class's request for judgment in tort against United is rejected on the grounds LP & L's was.

I. CONVERSION COSTS

NOPSI's contract with United was scheduled to expire on June 1, 1975. The trial judge correctly ruled that NOPSI's management planned conversion of its generating units to oil-burning capability. NOPSI knew, from United's peak-day problems in the winter of 1969-1970 and other indications, that NOPSI might not be able to get gas and might have to burn oil after June 1, 1975. NOPSI had therefore begun preliminary planning and long-range budgeting for conversion to oil. United emphasizes that this occurred before United began curtailing.

As in the case of Sterlington's Phase II, however, the conversion had to be done earlier than otherwise necessary, because of United's breach. The conversion of Paterson station and Michoud unit 2 was completed in December 1972, that of Michoud 3 by March 1973, and that of Michoud 1 by April 1973. Thus, again, these conversions were completed over two years earlier than necessary for readiness for July 1975.

NOPSI ultimately converted seven gas units from part-time to full-time oil-burning capability. It did not finish

this conversion before its United contract expired, but part of the conversion that was completed was used (together with the pre-existing part-time oil capacity) to generate electricity that would otherwise have been generated by United's gas. NOPSI seeks all conversion costs that were expended up until the June 1, 1975 expiration of its United contract.

The ratepayers note that, of the power NOPSI generated from January 1973 through the May 1975 expiration of the contract, 35% was generated with oil. They argue that this generation, replacing generation that United gas should have fueled, would not have been possible had NOPSI not converted. This argument is not wholly persuasive, because NOPSI had part-time oil-burning capability prior to the conversion, and the noted 35% of power was not generated by burning oil exclusively in the new, full-time burners. The rate-payers also assert that, had United not curtailed, utility regulation principles would not have allowed NOPSI to include, as a "used and useful" capital investment for rate purposes, the $8 million spent before the United contract expired.

We conclude, as we did with LP & L's Sterlington Phase II conversion cost, that certainly it would be wrong to assign to United 100% of NOPSI's conversion cost but, equally certainly, it would also be wrong to assign to United 0% of that cost. The useful and necessary life of the NOPSI conversion falls far less within than without the life of the breached United contract. Moreover, the basic division of costs on the basis of the June 1, 1975 date of expenditure does not adequately identify the costs of the conversion whose earlier completion can be deemed caused by United's breach. We deem it reasonable and fair—certainly more correct than either 100% or 0%—to assign to United 25% of only those costs expended within the period of United's breach.

Of the total conversion costs of $14,481,168, those before the contract expired were $8,031,276. Of that amount we award NOPSI $2,007,819.

II. LOST PROFITS

On Sales to Off-System Utilities

NOPSI's claim for the loss of $34,457,304 profit that it would have made by selling cheap electricity to other utilities outside the Middle South system was rejected by the trial judge on the grounds that the economic dispatch practice would not have allowed it and that it was beyond the contemplation of the parties at the time of the contract. NOPSI argues persuasively that its applicable written contracts with Middle South did not prevent sales to off-system utilities. NOPSI also argues that its requirements contract with United contemplated whatever gas NOPSI required to generate electricity. We agree with the first argument but we must temper the second.

La.C.C. 1901's requirement that contracts be performed "with good faith" applies to both parties. NOPSI and LP & L condemned United for its bad faith in its dealings. They contend that United (and Pennzoil) deliberately set out to create a gas shortage in order both to create a market, specifically in power plants, for higher-priced fuel oil and to increase the market price of natural gas. There is much record support for that contention. Were that established, United might be estopped from arguing its own fault and its high-price consequences as a defense to a demand by NOPSI for maximum contract requirements. The trial judge explicitly found, however, that United was not in bad faith in its actions and, whether or not that might have been our own inference, we cannot say that that inference is so unsupported by the record as to be clearly wrong. "[W]here there is conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review, even

though the appellate court may feel that its own evaluations and inferences are as reasonable." *Canter v. Koehring Co.*, 283 So.2d 716, 724 (La.1973).

But, to repeat, NOPSI was also bound to good faith dealing, in the exercise of its contractual right to its requirements. Our conclusion is that NOPSI was not entitled to demand anything more than its normal requirements, including increase in demand by area customers old and new, and perhaps, to the extent of NOPSI's usual participation, including similar increase in sibling utilities' area customers' demand. NOPSI was entitled to all of its customary requirements (within specified limits), including requirements not only for sales to its customers within its geographical area but also for its historical practice of sales to siblings and through the Middle South exchange to off-system utilities. But it was clearly not entitled to sell to other utilities its contract rights to cheap United gas. We conclude that it is equally not entitled in effect to do so by converting the gas into electricity for unprecedented direct sales outside the Middle South system.

The question is whether, when fuel costs skyrocketed, the "requirements" contract entitled NOPSI to the full limit of the specified maximums of United's cheap gas and therefore to the profits that NOPSI could have made with that cheap gas.

United points out that the quantities on which NOPSI calculates its claim could only be generated if NOPSI ran its generators at a capacity factor of over 81% (which, United also argues, would have burned more gas than the contract's maximum daily delivery obligations). United does not show physical impossibility of operating year-round at 81% of capacity, but it does make NOPSI's claim somewhat doubtful. A theoretical capacity factor of 100% would require all generators to run at top capacity every minute of the year, with no stops for maintenance or repair. NOPSI's capacity factors before curtailment rarely exceeded

50% and never exceeded 58%. Thus NOPSI's claim is based on sales that would increase generation by perhaps half or more. (An increase from 50% to 80% of capacity would be 60% of the original 50%).

C.A. Andrews C. Co. v. Board of Directors of Public Schools, 151 La. 695, 92 So. 303 (1922), considered the problem of a buyer's demands for unprecedented "requirements." In that case, the school board in May 1916 invited bids for a year's supply of each of anthracite and bituminous coal, estimating annual consumption at 500 tons of anthracite and 1,000 tons of bituminous, but reserving the right to order more or less depending on "actual requirements." Plaintiff successfully bid to supply the bituminous coal at $3.75 a ton. Thereafter, the school board abandoned anthracite as a fuel. The market price of bituminous increased to $6 a ton by Fall 1916. Because consumption was double what it expected, plaintiff notified the board that it would not deliver beyond 1,200 tons at the contract price. The suit was for the excess of market over contract price, on the coal delivered in excess of 1,200 tons. Reversing a trial court judgment refusing recovery, the supreme court reasoned:

> "If the board had continued the use of both kinds of coal . . . the plaintiff would not have been required to deliver more than 1,200 tons under its contract. That amount was the 'average annual consumption' . . . and would have sufficed to meet the 'actual requirements. . . .'
>
> "[The use of both coals] must be regarded therefore as having been taken into consideration at the time of the contract, and . . . the plaintiff in . . . obligating itself to deliver 'all the coal required by the public schools' did not contemplate, and had no reason to anticipate that the school board would thereafter change the method of heating the schools, and that it (plaintiff) would be called upon under its contract

> to make delivery, by reason of the substitution of all bituminous for anthracite coal. . . . If, as a matter of fact, the increased consumption had been due to weather conditions, or to the enlargement or expansion of school buildings, or to increased school attendance, then clearly the plaintiff would have been required to make deliveries to meet such conditions. The increment of coal would have come within the meaning of the term, 'actual requirements. . . .' But that is not the case. The increased requirement was not the result of any of the conditions named, nor due to any cause within the contemplation of the parties at the time of the contract, but was brought about by the action of the school board in discontinuing the use of [anthracite].
>
> "Our conclusion is that the school board was not at liberty to arbitrarily change the conditions prevailing at the time of the contract . . . and to thereby impose upon the plaintiff the obligation of delivering the additional coal required on account of such changed conditions."

Notwithstanding the presence in the United contract of specified limits upon NOPSI's "requirements," we conclude that the contract intended no more than to supply NOPSI's customary usages. Customary usages allow some unusual increases, as, for example, if an unusual increase were required because a giant industry using great quantities of electricity were to locate within NOPSI's area. NOPSI's "requirements" would include gas to produce electricity for that new consumer. The specified contractual limits on requirements are not intended, however, to make the term requirements superfluous, or to displace the ordinary understanding of the term, as set forth in *Andrews*. The limits are intended, instead, to protect against an increase still within "requirements" but not provided for by ordinary capacity or ordinary planning (as

in our hypothetical case of a giant industry's moving into NOPSI's area).

NOPSI's claim for lost profits on sales to off-system utilities is not within requirements because not within the normal growth of the demands of its regular consumers (including other utilities). NOPSI's claim is that, with all utilities obliged to pay extremely high fuel costs, it could have made a theoretical windfall by selling cheap electricity. One who owes requirements does not owe a windfall. The trial judge correctly rejected this claim.

On Sales to Area Customers

NOPSI charged a base rate authorized by the governmental rate-fixing agency, and included in that base rate was NOPSI's profit. NOPSI added to the base rate, by the fuel adjustment clause, the increased cost of fuel, upon which it made no profit. The result was a sharply higher total price of electricity. NOPSI contends that, because of the higher price, its customers bought less electricity than they would have, and that NOPSI lost profit of $6,390,892 on the difference between actual sales during United's breach and the sales that NOPSI had projected. NOPSI did present some evidence (including testimony by some New Orleanians of their own reduction in use because of higher prices) that higher prices would reduce consumption of electricity. And, indeed, some (but, United insists, not all) classes of consumers did decrease usage. NOPSI therefore claims $6,390,892 as an item of damage expressly within La.C.C. 1934's measure of damage as, in part, "the profits of which [one] has been deprived."

The trial judge rejected this claim, citing uncertainty in NOPSI's projections of anticipated increase in sales, and also citing energy conservation campaigns and an economic recession after the Arab oil embargo, both of which presumably decreased consumption of electricity.

Our strong suspicion that, as some individuals testified, high prices reduced consumption does not amount to a

conviction that the trial judge was clearly wrong in rejecting this claim. We are unable to fix with certainty even any portion of the projected loss as more probable than not. We therefore affirm the trial judge's disallowance of this item.

DECREE

The judgment in favor of Louisiana Power and Light Company against United Gas Pipe Line Company is affirmed but its quantum is increased by $49,674,861 to $89,984,003 with pre-judgment legal interest upon the several items of damage at the rates and from the times provided in the body of this opinion, and the judgment's provision for deposit into the court is deleted.

The judgment in favor of New Orleans Public Service, Inc. and the class of its ratepayers against United Gas Pipe Line Company is affirmed but its quantum is increased by $2,007,819 to $46,410,925, with pre-judgment legal interest as provided for LP & L.

United is to pay all of its own costs and 85% of LP & L's costs and 90% of NOPSI's (and the class's) costs. Other parties are to pay their own costs.

APPENDIX B

COURT OF APPEAL, FOURTH CIRCUIT
STATE OF LOUISIANA

Clerk's Office, New Orleans JAN 19 1988

DEAR SIR:

REHEARING WAS THIS DAY REFUSED IN THE CASE ENTITLED

CITY OF NEW ORLEANS, ET AL VS. UNITED GAS PIPE LINE CO. CONSOLIDATED WITH LP&L VS. UNITED GAS PIPE LINE CO., ET AL No. CA-3613-3614

Very truly yours,

(THREE APPLICATIONS)
DANIELLE A. SCHOTT
CLERK OF COURT

APPENDIX C

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 575-544 DIVISION "J" DOCKET NO. 4

CITY OF NEW ORLEANS, *et al.*

versus

UNITED GAS PIPE LINE COMPANY

NO. 579-040 DIVISION "J" DOCKET NO. 4

LOUISIANA POWER & LIGHT COMPANY

versus

UNITED GAS PIPE LINE COMPANY

REASONS FOR JUDGMENT

United Gas Pipe Line Company ("United") is a natural gas transmission company, organized in 1937, that purchases gas predominantly from independent, non-affiliated gas producers, transports the gas through its pipeline system, and then sells the gas to customers for their own use (commonly called "direct sales") or for resale to their customers (commonly called "sales for resale"). Since 1937, (and prior to that time through predecessor companies), United has operated a single, interconnected natural gas pipeline system in all or portions of the States of Louisiana, Texas, Mississippi, Alabama and Florida, a region often referred to as the "Gulf South". During the 1960s and 1970s, United served several hundred direct and resale customers in Louisiana, including New Orleans, and over 250 smaller communities, as well as customers in other portions of the Gulf South.

New Orleans Public Service Inc. ("NOPSI"), a wholly-owned subsidiary of Middle South Utilities, Inc., is both a resale and direct sale customer of United. As a resale customer, NOPSI engages in the distribution of gas throughout the City of New Orleans and, as a direct sale customer, NOPSI uses the gas from United to generate electricity that is transmitted and sold in the City of New Orleans and elsewhere. NOPSI has brought suit against United only in its capacity as a direct sale customer.

The City of New Orleans ("City") is one of NOPSI's consumers of electricity and, acting through its City Council, established NOPSI rates for electricity up to January 1, 1982. The "Class" purports to comprise all persons and organizations purchasing electricity from NOPSI from January 1, 1973 through June 1, 1975. With respect to the class action, on March 31, 1983, this Court certified the Class of Electric Ratepayers of NOPSI, finding that the persons constituting the Class (about 187,000) are so numerous as to make it impracticable for all of them to join individually as parties; that the character of the rights sought to be enforced for the Class members are common to all such members; that Blake Arata, David Cressy, Jacob Taranto III, the City of New Orleans and the State of Louisiana insure the adequate representation of all Class members; that a class action is superior to other available methods for the fair and efficient adjudication of the claims of the class members; that the Class members meet all requirements set forth in Code of Civil Procedure, Articles 591 *et seq.* and of the jurisprudence of this state, and that the Class representatives fulfilled due process requirements pertaining to proper and due notice to the Class members, by forwarding to each Class member a class action notice in July-August, 1974, January-March, 1982 and by causing the publication of a notice in the Times-Picayune of February 21, 1982. This Court further found that until further notification, no further notice was nec-

essary at such time. This court reaffirms the certification of the Class.

Louisiana Power & Light Company ("LP&L") is a direct sale customer of United that uses the gas delivered by United as fuel for the generation of electricity in LP&L's steam electric generating stations.

The Louisiana Public Service Commission ("LPSC") is an agency of the State of Louisiana vested with the responsibility, *inter alia,* for regulating LP&L's electric utility rates.

For a portion of the trial, Gulf States Utilities Company ("Gulf States") was included as a party to this proceeding. Gulf States, like LP&L, is a regulated electric public utility company subject to the regulation of the LPSC at all times pertinent to this proceeding. Gulf States has been dismissed from the proceeding pursuant to a settlement agreement with United. However, evidence sponsored at trial by witnesses called by Gulf States or introduced by Gulf States was submitted on behalf of the plaintiffs and LPSC and, where appropriate, has been considered by the Court in its deliberations.

The Court has jurisdiction over the parties and jurisdiction to determine the ultimate and controlling issues in the case and to grant the relief petitioners seek.

The contract on which this action was brought by NOPSI and the City/Class, executed on July 21, 1952, obligated United to sell and deliver to NOPSI for a term ending on June 1, 1975, (a) NOPSI's total requirements of gas for resale from its distribution system in Orleans Parish (resale gas), and (b) NOPSI's total requirements for gas as fuel at its two electric generating plants in Orleans Parish and any other electric plants thereafter constructed and operated in Orleans Parish (power plant gas), not to exceed, however, 125,000 Mcf of power plant gas or 270,000 Mcf of resale and power plant gas in any one day. The

price NOPSI agreed to pay for power plant gas during the initial period ending June 1, 1960 was 13 cents per Mcf, less one-half cent per Mcf United agreed to pay NOPSI for tranpsorting the power plant gas in its distribution system from United's pipeline metering facilities to NOPSI's power plants. For the contract volumes of power plant gas delivered each consecutive five-year period, NOPSI agreed to pay United a price per Mcf to be thereafter determined in accordance with a formula in the contract.

The rates per Mcf NOPSI agreed to pay for the contract volumes of resale gas delivered during the term of the contract were the rates fixed from time to time by the LPSC which had jurisdiction under the laws of Louisiana over United's sales of gas in intrastate commerce for resale and over its intrastate pipeline system in Louisiana through which the resale gas was transported and delivered into NOPSI's local distribution system. The contract expressly provided that it would not become effective in whole or in part unless and until the LPSC approved an attached rate schedule. On August 13, 1952, United filed with the LPSC an application for approval of the contract and attached rate schedule which the Commission approved on February 24, 1953 with some modifications in the rate schedule, and the parties approved on April 1, 1953. Deliveries began under the contract on March 23, 1953.

Numerous amendments were made to the contract at various times increasing the prices NOPSI agreed to pay for power plant gas and enlarging the volumes of power plant and resale gas United agreed to deliver to NOPSI. In a letter agreement dated May 31, 1960, the parties agreed on a higher price NOPSI would pay for power plant gas delivered during the five-year period June 1, 1960 to June 1, 1965. In a subsequent letter-agreement dated April 28, 1965, they agreed on a price of 22 cents per Mcf for power plant gas sold and delivered during the five-year

period commencing on June 1, 1965 at 7:00 o'clock A.M. and terminating on June 1, 1970 at 7:00 o'clock A.M., and a price of 23 cents per Mcf for power plant gas sold and delivered during the last five-year period of the contract commencing on June 1, 1975 at 7:00 o'clock A.M. They also agreed that the prices of 22 cents per Mcf and 23 cents per Mcf for power plant gas were based on the volumes of power plant gas delivered during a billing month containing a weighted average of 1078 British Thermal Units (Btu) per Mcf, that when the weighted average Btu content of the power plant gas exceeded 1078 Btu per Mcf the price per Mcf would be increased proportionately, and when the Btu content was less than 1078 Btu per Mcf the price per Mcf would be decreased proportionately. Subsequently January 31, 1975 the parties in a letter-agreement dated January 31, 1975 further agreed that for the period commencing on January 1, 1975 at 7:00 o'clock A.M. NOPSI would pay United for power plant gas sold and delivered during the remaining four months of the last five-year period a price per Mcf equal to United's weighted average cost per Mcf of purchased gas.

Pursuant to the provisions of the contract NOPSI, on various dates in the period 1952 to 1970, requested United in writing to increase the maximum daily quantities (MDQ) of resale gas and the MDQ of power plant gas, thereafter sold and delivered to NOPSI under the contract, to which requests United consented in writing as shown by the following letter agreements dated: (a) November 17, 1952 increasing the MDQ from 270,000 Mcf to 300,000 Mcf; (b) November 7, 1957 increasing the MDQ from 300,000 Mcf to 325,000 Mcf; (c) October 26, 1959 increasing the MDQ from 325,000 Mcf to 340,000 Mcf; (d) September 21, 1960 increasing the MDQ from 342,700 Mcf to 354,500 Mcf; (e) August 9, 1961 increasing the MDQ from 354,500 Mcf to 369,500 Mcf; (f) October 1, 1962 increasing the MDQ from 369,500 Mcf to 377,000 Mcf; (g) April 15, 1965 increasing

the MDQ of power plant gas from 125,000 Mcf to 169,000 Mcf and further increasing the MDQ of power plant gas in 1967 from 169,000 Mcf to 292,920 Mcf when NOPSI completed and commenced operating a new electric generating unit at its Michoud plant; (h) August 12, 1965 increasing the MDQ from 377,000 Mcf to 392,000 Mcf; (i) August 12, 1966 increasing the MDQ from 392,000 Mcf to 422,000 Mcf; (j) December 15, 1967 increasing the MDQ from 422,000 Mcf to 434,000 Mcf; (k) September 18, 1969 increasing the MDQ from 434,000 Mcf to 448,000 Mcf; and (l) September 14, 1970 increasing the MDQ from 448,000 Mcf to 477,400 Mcf.

On February 20, 1956, LP&L and United entered into a contract entitled "Gas Sales Agreement" ("The Sterlington Contract") whereby United agreed "to sell and deliver or cause to be delivered" to LP&L and LP&L agreed "to purchase and receive" from United, natural gas for use in LP&L's Sterlington Steam Electric Generating Station. The Sterlington Contract provided that "[t]his agreement shall be for a term commencing on March 26, 1958, at 7:00 A.M. and shall end on April 1, 1978 . . ." United was obligated to sell and deliver natural gas for all of LP&L's requirements for its Units Five and Six at Sterlington not in excess of 50,000 Mcf in any one day.

On December 2, 1969, United and LP&L amended the Sterlington Contract to provide for a sales obligation for a portion of the requirements of the Sterlington Station not in excess of 30,000 mcf per day during calendar year 1970 and not in excess of 25,000 mcf per day during the calendar years 1971 through 1974. The term of the Sterlington Contract remained unchanged and thus extended through April 1, 1978.

On December 31, 1974, after LP&L had filed its lawsuit herein, United and LP&L entered into an amendment to this contract to provide for a new monthly rate through the expiration of the contract term of April 1, 1978. The

amended Sterlington Contract continued to provide for sales and delivery of 25,000 mcf per day maximum. At United's insistence, this contract purported to recite that the amount of United's delivery obligation would be subject to its Federal Power Commission ("FPC") tariff, a point then disputed by United and LP&L in this lawsuit, but the parties specifically reserved all pending claims that they had prior to the signing of this amendment. The Court finds that United's delivery obligation was a portion of LP&L's requirements not in excess of 25,000 mcf per day through April 1, 1978, and that United's deliveries to LP&L under the Sterlington Contract were in interstate commerce and subject in part to regulation by the FPC. The Sterlington Contract was a direct industrial sales contract, or "non-jurisdictional" contract to the extent that rates and other terms were set by negotiation.

On May 6, 1968, United and LP&L entered into a contract entitled "Gas Sales Agreement"("The Ninemile Point Contract"), whereby United agreed "to sell and deliver" and LP&L agreed "to purchase and receive" all of the fuel requirements for the operation of LP&L's Ninemile Point Power Plant Units 1, 2, and 3, not to exceed 125,000 mcf per day until LP&L placed its new Unit Four into commercial operation and thereafter 33 1/3% of the fuel requirements of LP&L's entire Ninemile Point Power Plant, not however, to exceed 80,000 mcf in any one day to January 1, 1993. The Ninemile Point contract was a novation of an earlier contract between LP&L and United which had been submitted to the Louisiana Public Service Commission for approval. United's deliveries to LP&L under both of these contracts were through its Lirette-Harvey line which was part of its Louisiana intrastate pipeline system referred to in this trial as "New Orleans District 5" until United sought to certificate this system as part of its interstate system.

Initially, the Court is of the opinion that the NOPSI-United gas sales contract and all amendments are valid

and binding agreements. Likewise, the LP&L-United Nine Mile Point Contract and Sterlington Contract and all amendments are valid and binding agreements.

During the period April 1, 1971 to June 1, 1975, United did not sell and deliver the total contract quantities of power plant gas NOPSI required as fuel in generating electricity at its Paterson, Market Street and Michoud steam electric stations in Orleans Parish.

Sometime in October of 1970, United notified LP&L that it would be unable to deliver the contracted-for quantities of gas under the Ninemile Point Contract and Sterlington Contract, as amended, and on October 26, 1970, United made a filing with the FPC in which it declared that it was unable to deliver in full to all of its customers and that it would begin to allocate deliveries among its customers. Thereafter, United failed to deliver the contracted-for quantities of gas to LP&L during the years 1971-1981 inclusive, as provided for in the Ninemile Point and Sterlington Contracts, as amended.

The ultimate issue presented by the breach of contract claims alleged by the plaintiffs is whether United's failure to deliver the quantities of gas under contract constituted a breach of United's delivery obligation under the contract or do the contracts provide for a reduction of United's delivery obligation during a shortage of natural gas.

The NOPSI contract was a contract for the sale and delivery to NOPSI of resale and power plant gas in intrastate commerce from United's New Orleans District Five intrastate system over which the LPSC exercised exclusive jurisdiction. United, however, began in July 1965 delivering some gas into one of the lateral lines of the intrastate system from its interstate system and continued such deliveries into other segments of the intrastate systems until October 1970. In October 1970 United applied to the FPC for a certificate authorizing it to operate the intrastate system as a part of its interstate system on

which it then had a gas shortage. NOPSI opposed the application, but the FPC granted the application in July 1973 on the ground that the FPC acquired jurisdiction over the intrastate system by United delivering substantial quantities of interstate gas into the intrastate system in the 1965-1970 period.

The evidence shows that United released a majority of its dedicated intrastate gas reserves in the 1963-1967 period. Additionally, United's policy of not purchasing major new reserves in the 1960's, its increased gas sales, and its attaching the intrastate system to its interstate system on which it then had a gas shortage caused the shortage that subsequently developed on the New Orleans District Five system in the 1970's. United needed the gas reserves it had released to meet its gas sales contract obligations. United should not have improvidently released a substantial part of the reserves, and then failed to promptly replace them. The evidence clearly shows that, had United continued operating the New Orleans District Five system as an intrastate system, and had it not improvidently released in the 1962-1965 period a large part of its dedicated gas reserves attached to the intrastate system, and had it pursued a policy of purchasing in the 1960's and 1970's dedicated gas reserves available to intrastate pipelines, it would have had adequate gas reserves to sell and deliver to NOPSI the contract quantities of gas until June 1, 1975, the date the 1952 contract terminated, and it would not have experienced a gas shortage throughout the 1970's on its intrastate system.

After United applied to the FPC to issue an interstate certificate for United's Louisiana intrastate system, United filed with the FPC a petition declaring there was a shortage of gas on its interstate system and stating that United would allocate deliveries among its interstate customers. Beginning in 1971, United failed to deliver full contract quantities of gas to LP&L. Indeed, United failed to deliver

the contract quantities of gas to LP&L during the years 1971 through 1981.

Any shortage of gas in the 1970's on United's interstate system which may have rendered it incapable of selling and delivering to LP&L the contract quantities of gas was caused by United's improvident actions. In the 1960's United released large volumes of dedicated remaining recoverable gas reserves attached to its system. In addition, United failed to purchase and attach to its systems new dedicated gas reserves that were available in the 1960's and 1970's. Furthermore, United increased its sales of gas during the 1960's without correspondingly attaching adequate new gas reserves to supply the increased sales although it had insufficient reserves to supply these obligations and meet its existing customer requirements. All of these actions proved to have an impact on United's ability to meet the needs of its customers and comply with its contract obligations.

The record reflects that United also failed to ensure the adequacy of supplies on its New Orleans District Five intrastate system. United improvidently released large volumes of dedicated remaining recoverable gas reserves attached to its New Orleans District Five intrastate system in the 1960's. Moreover, it failed to attach to its intrastate system, new dedicated gas reserves that were available in the 1960's and 1970's. In addition, in the 1965-1970 period, United injected volumes of gas from its certificated interstate system into its District Five intrastate system, thus subjecting the intrastate system to the FPC jurisdiction and the weaknesses of the supply-shortened interstate system. Any shortage of natural gas which may have developed on United's New Orleans District Five system thus could have and should have been foreseen by United.

United contends that delivery obligations under the contracts in question are "subject to the terms, conditions and limitations" of the contracts.

One of the "terms, conditions and limitations" in the contracts is sometimes referred to as the "impairment of deliveries" or "public utility" clause which provided for reduction of United's delivery obligation by stating that, "[i]n the event a shortage of gas renders Seller (United) unable to supply the full gas requirements of all of its customers, including Buyer (NOPSI or LP&L), . . ." United was to first supply the gas requirements of domestic gas users before supplying any gas to NOPSI or LP&L for power plant use and then was to prorate the remaining available gas among NOPSI, LP&L and other customers based on the priorities set forth in the clause. This contract provision therefore reduced the amount of gas that would be delivered to NOPSI or LP&L during time of shortage.

On December 31, 1974, LP&L and United amended the "impairment of deliveries" clause of the Sterlington contract to provide as follows:

> The section entitled 'Impairment of Deliveries' of the General Terms and Conditions of United Gas Pipe Line Company's (Seller's) Federal Power Commission Gas Tariff is incorporated herein by reference and for purposes of this agreement shall be treated as if it were set out in full. It is recognized that such section may be changed, amended or revised from time to time and it is agreed that such changed, amended or revised Impairment of Deliveries provisions under the Gas Tariff will also apply hereunder as they occur and shall be effective immediately without prior notice, written or otherwise, to Buyer. It is agreed, however, that Seller will provide Buyer with a copy of any changes in the Impairment of Deliveries clause of the Gas Tariff as soon as practicable.

Another one of the "terms, conditions and limitations" in the contracts affecting United's delivery obligation is

sometimes referred to as the "duly constituted authorities" clause and subjects deliveries of gas to LP&L to the possible exercise of federal or state regulation by providing:

> This agreement is especially made subject to all present or future valid rules, regulations or orders of any commission or regulatory body having jurisdiction.

Another one of the "terms, conditions and limitations' in the contracts was the "*force majeure*" clause, which defined *force majeure* as a series of enumerated causes "and any other causes . . . not within the control of the party claiming suspension and which by the exercise of due diligence such party is unable to prevent or overcome . . ." and provided for suspension of United's delivery obligation when United was ". . . rendered unable wholly or in part by force majeure to carry out its obligations . . ." for such period as was required to remedy the *force majeure* event.

Although the Sterlington contract was amended from time to time, the "terms, conditions, and limitations" noted above were never amended except for the 1974 amendment to the "impairment of deliveries" clause. The 1968 Ninemile contract has never been amended.

The contract terms governing United's delivery obligations during a natural gas shortage are to be considered in light of the intent of the parties in accordance with applicable state law.

The contracting parties focused on the contracts' "terms, conditions and limitations" prior to executing the contract. For example, in the negotiations leading to execution of the NOPSI and LP&L contracts in 1952 (the contracts were negotiated in concert), United rejected proposals to limit the impairment of deliveries clauses (a) to a shortage in United's "New Orleans District", (b) to a "temporary

shortage" or (c) to a shortage limited to *force majeure* conditions.

United's failure to deliver the contract quantities of gas to LP&L and NOPSI was not the result of force majeure, or any other cause or causes not within United's control, or which United could not prevent or overcome by the exercise of due diligence. In the exercise of due diligence, United could have prevented the gas shortage it experienced on its systems in the 1970's (a) by retaining instead of releasing in the 1960's large volumes of dedicated gas reserves then attached to its systems; (b) by purchasing and attaching additional gas reserves to its systems that were available at economic prices; (c) by not increasing sales of gas in the middle and late 1960's when United was simultaneously reducing its dedicated gas reserves; and (d) by maintaining a reasonable balance between dedicated gas supplies and contract demands of its customers.

United's management was imprudent in permitting its gas supplies to dwindle, relative to its delivery obligations, to an amount that did not permit adequate service to customers. Management failed to take adequate steps to determine the implications of its actions or to assure an adequate supply to meet the obligations of the company. United's management relied on its ability to contract in the 1970's for supplies sufficient to meet obligations undertaken in the 1950's and 1960's.

At the time that United entered into its contracts with NOPSI, LP&L, and its other customers, United knew that it did not have enough gas under contract to meet its delivery obligations for the life of those contracts. United was aware of an increasing competition for new reserves. By promising to sell gas that it did not own, United knew or should have known that there was a risk that it would not be able to get gas at favorable prices to meet increasing demands or obligations. However, United managed its system on the assumption that it could always get addi-

tional gas in the future whenever needed, wherever needed and at an advantageous price to meet the obligations already committed. This same philosophy was repeated annually in United's statements to the FPC in its Form 15 filings with the FPC—that new reserves were available and would be added as needed.

The Article in the contracts, generally referred to during the trial as the "impairment of deliveries clause" does not, and was not intended to relieve United of liability for its failure to deliver to LP&L and NOPSI the contract quantities of gas. The articles relieve and were only intended to relieve United of liability for failure to deliver supplies when there is a gas shortage which resulted from one or more force majeure causes enumerated in the other provisions of the contracts, *and* where United prorated its gas supplies between its customers in the order of priorities enumerated in the articles, and not some different order of priorities. Therefore, the prerequisites have not been met. Furthermore, as indicated above, United's own improvident actions were the reason for governmental orders for prorated deliveries of gas.

No fortuitous event or irresistable force prevented United from supplying LP&L and NOPSI the contract volumes of power plant gas. United's gas shortage was not a fortuitous event. The shortage developed in the 1960's when United released large volumes of dedicated gas reserves, ceased purchasing new reserves and increased its sales of gas. Nor did any irresistible force prevent United from purchasing new gas reserves or balancing supply and demand.

Though it was compensated (through the prices bargained for and included in its sales contracts) for the risk of having to acquire new gas supplies to meet contract obligations, United did not act prudently to ensure an adequate supply. As a result of United's improvidence, United became incapable of meeting its contract obligations for

deliveries of gas and NOPSI, LP&L and the ratepayers of these companies had to pay more for the energy that United had contracted to deliver.

The shortage on United's system was neither an implied "resolutory" condition nor an implied "suspensive" condition of any of the contracts herein. In addition, none of the contracts was a "divisible installment" contract. United is not exculpated from liability on any of these grounds.

The performance of the contracts was not excused in whole or in part by the failure of any "cause" or "consideration or motive" for making the contract.

The Court is of the opinion that United's failure to deliver NOPSI the contract quantities of power plant gas during the period November 1, 1970 to June 1, 1975 breached its contract as amended with NOPSI.

The Court is further of the opinion that United's failure to deliver to LP&L the contract quantities of natural gas during the period 1971-1981 breached its contracts as amended with LP&L.

No tariff filed by United with the FPC or the Federal Energy Regulatory Commission (FERC) exculpated or exonerated United from liability for breach of its contracts with NOPSI and LP&L. Whether or not United's partial deliveries to NOPSI and LP&L during the period of United's breaches were pursuant to a "curtailment plan" for United's system made effective or allowed to be made effective by United, the FPC, the FERC, or the United States Courts, whether such plans were approved or not, or held lawful or unlawful, presents no defense to United's breaches of its contracts with NOPSI and LP&L.

Plaintiffs allege that defendant United was in bad faith when United breached its respective contracts.

Beginning in late 1969, when United first recognized the possibility of peak day shortages, it began to advise

its customers of the situation. In early and mid 1970, it maintained contracts with its customers and with the FPC to apprise them of potential gas supply problems. The record in this case does not establish that United at any time deliberately misrepresented the amount of gas supplies that it owned or had under contract or its ability to meet the requirements of NOPSI or LP&L. It was United's belief and expectation that gas supplies would be available to it in the future in sufficient quantities to enable it to meet the requirements of all its customers. However, United's beliefs and expectations did not materialize. Any actions taken by United and its management based on expectations that gas supplies would be available in the future in sufficient quantities were not willfully intended or calculated to lead to breach of its gas supply contracts with NOPSI and LP&L.

United's deliveries in the New Orleans area through its District 5 facilities are extremely "temperature sensitive", i.e., they fluctuate substantially and frequently depending upon the temperature in the New Orleans area. Because of the unavailability of storage facilities, the problems involved in rapidly varying the volumes of field deliveries of gas and the economics of constructing new pipeline facilities to operate at low load factors, United was unable to utilize all available capacity from fields exclusively connected to District 5 facilities to meet demand in the New Orleans area. Commencing in 1965, United needed to use and did use gas from its New Orleans District 6 facilities to help serve customers in this area. During the 1950s and 1960s, it was United's policy that District 6 gas could be used in District 5 if it was required to serve customers in the New Orleans area. During the period 1966-1970, United disclosed its flows of interstate gas into the former district 5 facilities in annual reports submitted to the FPC and in certificate applications filed with the FPC. United sought and received FPC approval to use interstate gas to serve a new customer in District 5 and to connect its

District 5 facilities with those of another interstate pipeline. United also operated certain fields in South Louisiana, sometimes referred to as "swing fields", that could deliver gas into either District 5 or District 6. During the 1950s and 1960s, gas from the swing fields was needed to serve United's requirements in the New Orleans area. United's swing field operations were well-known by the producers that sold gas to United in the New Orleans area and were disclosed by United and by the producers to the FPC.

By virtue of a decision known as the "Florida Parishes" case, the FPC affirmed its jurisdiction over United's sales for resale in a portion of Louisiana north of Lake Pontchartrain (but not District 5) on the ground that the gas used to serve the communities in question, although produced, transported and consumed in Louisiana, was "commingled" with gas that crossed the Louisiana state line and hence was in interstate commerce. The FPC's decision was affirmed by the courts and became final in 1966. In 1966 and 1967, United conducted a review of its system to determine the possible impact of the "Florida Parishes" decision on the jurisdictional status of facilities and sales on other portions of its system, including District 5.

On October 1, 1970, United applied to the FPC for issuance of a certificate of public convenience and necessity with respect to various portions of its system, including District 5, that had been treated as not subject to FPC jurisdiction. The matter was designated Docket No. CP71-89 and hearings were conducted on the application. NOPSI, LP&L and the LPSC were parties to this proceeding. In Opinion No. 610, the FPC found that "United has introduced significant quantities of interstate gas into its Lafayette and New Orleans facilities and has commingled uncertificated and interstate gas supplies since 1965", and that "were it not for deliveries of interstate gas in the past years, the system would have been unable to meet its peak day requirements." The FPC further found that the former district 5 facilities became subject to federal

jurisdiction in 1965 when "the commingling of interstate and intrastate gas took place." The FPC's findings were affirmed on appeal. Subsequent to its finding of jurisdiction in Opinion No. 610, the FPC in a separate decision granted United a certificate of public convenience and necessity for, *inter alia,* the District 5 facilities. The United States Court of Appeals for the District of Columbia affirmed this decision, stating in part:

> Beginning about 1965 the independent gas reserves which United had relied on to operate the New Orleans Division declined and became inadequate to serve the intrastate markets of that division. Accordingly United began transferring gas from its interstate facilities to the intrastate facilities in the New Orleans Division. The first transfer occurred on July 25, 1965.
>
> (*State of Louisiana v. FPC,* 533 F.2d 1239, 1241 (D.C. Cir. 1976).)

The Court is of the opinion that United's use of interstate gas in its District Five facilities in the New Orleans area was not motivated by ill will but was in furtherance of its delivery obligations under the contracts. The Court sees no direct evidence to support plaintiffs' allegations of improper motive and conduct with respect to United's actions which subjected the sales, service and facilities in District Five to federal jurisdiction. The record in this case does not establish that United abused the jurisdiction of the FPC, or that such alleged abuse was intended to permit United to breach its contracts with NOPSI or LP&L.

Although curtailment tariffs and FPC/FERC curtailment orders would ordinarily exculpate a pipeline from contractual liability for curtailments, such tariffs and orders in this case will not exculpate United from its liability herein because the Court is of the opinion that United's shortage of supply was induced by the unrealized expectations and imprudent decisions of United and its management.

In conclusion, the record does not support the plaintiffs' claims that United breached its contracts with NOPSI and LP&L in bad faith.

Plaintiff's allegations of United's bad faith with respect to United's decision to form a separate interstate company in Texas are neither relevant or material in view of the Court's opinion that United was in good faith and did not breach its contracts from some motive or ill will.

The record in this case does not support the maintenance of a tort action by the City and Class.

The record does not further support the claim of *Actio de in rem verso* brought by the City and Class.

As this Court has found United liable for a good faith breach of the contracts with NOPSI and LP&L, United is liable for certain items of damages incurred by plaintiffs.

The supremacy clause of the United States Constitution does not preclude plaintiffs from recovering damages claimed in this action, nor does the clause require this court to await the FERC's determination of issues in Phase III before awarding damages to plaintiffs. No tariff filed by United with the FPC or the FERC will bar plaintiffs' recovery of damages.

No curtailment orders or plans promulgated by the FPC or FERC or curtailment plans proposed by United and approved by either Commission will bar plaintiffs' right to recover damages for breach of the contracts in suit.

The effect of a judgment on the defendant's fiscal viability is not a proper matter for consideration by this Court in a contract action such as this.

Article 1934 of the Louisiana Civil Code provides the measure of damages for breach of contract and recites, *inter alia:*

> "Where the object of the contract is any thing but the payment of money, the damages due to

> the creditor for its breach are the amount of the loss he has sustained, and the profit of which he has been deprived, under the following exceptions and modifications:
>
> 1. When the debtor has been guilty of no fraud or bad faith, he is liable only for such damages as were contemplated, or may reasonably be supposed to have entered into the contemplation of the parties at the time of the contract. By bad faith in this and the next rule, is not meant the mere breach of faith in not complying with the contract, but a designed breach of it from some motive of interest or ill will."

During the trial NOPSI claimed damages from United of $43,176,713 for the cost of alternate fuel, $1,226,393 for increased franchise and gross receipts taxes, $8,031,276 for the cost of converting generating facilities, $6,728,180 as lost profits from lost area load, and $34,457,304 as lost profits from lost utility sales. Damages alleged total $93,619,866. The city of New Orleans and the Class of Electric Ratepayers ("City/Class") join as co-plaintiffs with NOPSI in claiming the damages set forth above. Claims herein are described as claims of NOPSI. The plaintiffs also claim interest from the date of judicial demand.

At the trial, United presented evidence directed toward reduction or elimination of each element of NOPSI's claims.

United contends that the NOPSI alternate fuel claim should be reduced by $37,159,951 to $6,016,762 due to the so-called "power plant preference" being abolished by the FPC in January, 1973.

As part of a series of curtailment plans, the FPC placed deliveries of power plant gas in a fourth or lowest category of priority. United contends that this action of the FPC exonerates it from liability for any increased fuel cost. Opinion 647 of January 12, 1973 (49 FPC 179) was issued in Docket RP 71-29, a proceeding before the FPC initiated

by United on October 26, 1970. The only reason for United's application was that it had developed a shortage of gas on its interstate system. It thus requested the FPC to allocate deliveries of its remaining inadequate gas supplies between its customers pursuant to a curtailment proposal included in its application. Subsequently, during the ensuing decade, a number of different plans were submitted by United for approval by the FPC. The FPC thereafter issued a series of orders allocating United's available gas supplies. Such orders were entered after vigorous participation in the proceedings by United and others. All such orders were appealed to the United States Fifth Circuit Court of Appeal, which ultimately held that the plans approved by the FPC were unlawful and not in the public interest; accordingly the Court remanded the proceedings to the FPC. Hence, Order 647 is but one in a series of orders the FPC issued as a direct result of United's shortage on its interstate system and application for governmental intervention. That order, too, was vacated in *State of Louisiana v. FPC,* 503 F.2d 844 (5th cir. 1974) over the opposition of United.

The Court is of the opinion that the shortage is the cause of the damages, not the action of the FPC in trying to deal with the results of United's shortage. The curtailment orders did not cause the shortage, United's imprudent management decisions caused its shortage. United's failure to deliver the contract volumes is not attributable to the FPC's curtailment plans proposed and supported by United. Its failure is due to a shortage of gas on its systems which United could have avoided by the exercise of due diligence.

The City, Class, NOPSI and United stipulated that plaintiffs incurred $43,176,713 in fuel costs and purchased power costs in excess of the cost they would have incurred had United supplied NOPSI for the benefit of the Ratepayers the volumes of gas needed to generate the quantities of electricity NOPSI sold to its New Orleans

Ratepayers. They further stipulated that the amount of $43,176,713 was recovered by NOPSI from its New Orleans Ratepayers under the fuel adjustment charge provisions of the tariffs approved by the City Council. Therefore, this amount was borne directly by the Ratepayers, and NOPSI, the City and the Class have agreed that such amount will be returned to the Ratepayers.

The Court is of the opinion that the damages for alternate fuel costs and purchased power costs in the sum of $43,176,713 is a proper and reasonable item of damages in view of the Court's finding that United breached its contract with NOPSI in good faith. The Court is further of the opinion that damages for alternate fuel costs and purchased power costs awarded herein may reasonably be supposed to have entered into the contemplation of the parties at the time of the contract.

The parties also stipulated "... that the State of Louisiana by LSA - R.S. 47:106, has levied a tax upon the gross receipts of NOPSI at the rate of 2%; that the City of New Orleans, by Ordinance No. 4272 Mayor Council series has levied a tax upon the gross receipts of NOPSI (referred to as a Franchise Tax) at rate of 2.5%. The parties agreed that the excess fuel and purchased power costs [of $43,176,713] incurred in providing electricity to NOPSI's New Orleans Ratepayers resulted in increased gross receipt taxes being paid by NOPSI to the State of Louisiana in the amount of $146,975 and to the City of New Orleans in the amount of $1,079,418." There is no controversy about the fact that these taxes are a valid subject for recovery if liability is found.

The Court is of the opinion that damages for increased franchise and gross receipts taxes in the sum of $1,226,393 is a proper and reasonable item of damages in view of the Court's finding that United breached its contract with NOPSI in good faith.

NOPSI is making a claim against United for $8,031,276 for the cost of converting Michoud Units 1-3 and Paterson Units 1-4 to burn oil continuously.

NOPSI engaged consultants in 1970 to determine whether alternative gas suppliers could be secured for the period after 1975 but the consultants reported that no such suppliers would be available. NOPSI began planning to convert its units in March 1970, prior to notice of curtailment by United. In June 1970, before notice of curtailment by United, NOPSI's Senior Vice President ordered money to be put in NOPSI's long-range budget for conversion to oil. The NOPSI budget items for conversion show a target completion date of June 1975 and state that the purpose of conversion was to enable the units to burn oil after the expiration of the contract with United. Although a portion of the oil burning facilities was usable before June 1975, the conversion project was not completed until 1976.

The evidence reflects that NOPSI's management planned conversion of its generating units to oil burning capability. Furthermore, the Court is of the opinion that this conversion process was not within the contemplation of the parties at the time of the confection of the contract, or considered as a possible element of damages even if the contract was breached. Therefore, United is not liable for such damages.

NOPSI claims $6,728,180 in profits allegedly lost as a result of reduced sales to its area customers.

Plaintiffs base their claim for lost profits from lost area load on the difference between a projection of future sales of electricity made immediately before the Arab oil embargo of 1973 and subsequent sales of electricity during the period December 1973 - May 1975 that were below the prediction. Use of projections to show lost profits does not establish lost profits with reasonable certainty.

The evidence shows that reductions in sales of electricity were the result of patriotic campaigns at all levels of government for conservation of energy, advertisements promoting conservation, and an economic recession. Thus, NOPSI has failed to meet its burden of showing that the difference between the projection and actual sales, i.e., the alleged lost area load, was the result of United's breach of contract. Therefore, the loss of sales to NOPSI's area customers could not have been within the contemplation of the parties at the time the contract was entered into, and United is not liable for such damages.

NOPSI claims $34,457,304 in damages for profits it allegedly would have made on sales for its own account to utilities outside the Middle South system if United had not curtailed.

In the Middle South system, generating units are planned for the benefit of the system as a whole. Each company gets the benefit of its own cheapest generation and the next cheapest generation is to be made available to other Middle South companies at no profit. All Middle South companies are obligated to make available whatever low cost power they generate over and above their area load to sister companies at no profit. Sales by NOPSI directly to other utilities for its own account of low-cost energy generated on United's gas would have conflicted with the fundamental purpose of the Middle South system because such sales would have deprived the other Middle South companies of low-cost energy and thereby would have increased their costs.

Since NOPSI had never made or negotiated for any sales for its own account to other utilities or ever discussed with United the possibility that such sales might be made, the loss of profits due to NOPSI's inability to make such sales was not within the contemplation of the parties at the time the contract was executed. Therefore, United is not liable for such damages.

Accordingly, NOPSI and the City/Class should be awarded damages under their breach of contract claim in a total amount of $44,403,106. This award includes damages of $43,176,713 for alternate fuel costs and $1,226,393 for increased franchise and gross receipts taxes.

No damages should be awarded for conversion costs or lost profits.

No damages should be awarded under the tort or *actio de in rem verso* claim of the City and Class.

Although different amounts were claimed for various elements of damages in earlier pleadings, during the trial LP&L claimed damages from United of $78,523,963 for the cost of alternate fuel, $17,757,645 for the cost of converting generating facilities, $137,862,000 for the value of lost generating capacity, $5,126,760 for added maintenance expenses, and $1,648,481 for added operating costs. The total damages claimed by LP&L during trial was $240,918,849. LP&L also claims interest from the date of judicial demand.

At the trial, United presented evidence directed toward reduction or elimination of each element of LP&L's claim.

Because of the breach of contracts by United, LP&L's costs for fuel for generation of electricity increased. In order to supply electricity which would otherwise have been generated with gas supplied by United, LP&L either purchased power from other utilities or purchased other fuels to generate electricity (both referred to as alternate fuel during the trial). To measure the damages caused by the necessity to purchase alternate fuel or power, LP&L calculated the actual charges passed on to the Louisiana customers through the operation of the fuel adjustment clause and subtracted from that figure the amount that would have been paid by its Louisiana customers if United had delivered the full contract quantities of gas.

United claims a reduction of LP&L's alternate fuel claim due to the FPC's abolition of the "power plant preference".

Prior to January 1973, United's tariff and its contracts with LP&L provided that, in times of shortage, the requirements of United's power plant customers, including LP&L, for gas used to generate electricity for domestic use would be served before the requirements of some of United's other industrial customers. This provision is sometimes referred to as the "power plant preference". Approximately 50% of LP&L's requirements were in the power plant preference category. United's first curtailment tariff as made effective in 1952 contained the power plant preference. All tariffs proposed by United and/or made effective by the FPC between the commencement of curtailments in November 1970 and January 1973 included the power plant preference. On January 12, 1973, the FPC issued Opinion 647 which ordered United to eliminate the power plant preference from its curtailment tariff immediately. Pursuant to this order, the preference was eliminated on January 17, 1973.

The Court will adopt the reasons stated above with reference to United's proposed reduction of NOPSI's Alternate Fuel Claim based on the elimination of the power plant preference in denying any reduction of LP&L's alternate fuel claim based on the elimination of the power plant preference.

United claims a reduction of LP&L's claim for alternate fuel cost due to correction of error in LP&L's calculation of cost of generation using United gas at Ninemile Point in January 1977.

LP&L's damage claim is calculated by taking the cost of replacement energy sources allegedly used as a result of United's curtailments and subtracting the cost that LP&L would have incurred if United had delivered the gas needed to generate an equivalent amount of energy.

LP&L's work papers purport to show a price of energy generated using United gas at Ninemile Point for January 1977 calculated at 2.48 mills per kwh. Testimony reflects that generation of electricity on United's gas at this price would require an assumption that electricity was generated at a physically impossible heat rate; moreover, the calculated price is sharply lower than the calculated price for energy generated using United gas in other months. Accordingly, the calculated price is clearly a mathematical error. Testimony further shows that the correct calculation of the price of energy using United's gas cost for January 1977 is $7.92 per mwh (or 7.92 mills per kwh). If LP&L had made the correct calculation of United's fuel costs for January 1977, its claimed additional fuel costs (and its damage claim against United) would be reduced by $1,381,135.

$1,381,135 of LP&L's alleged additional fuel costs for January 1977 is attributable to an error in LP&L's calculations and not to United's breach of contract. As a result of the foregoing, LP&L's damages should be reduced by $1,381,135.

LP&L has included in its damage claim the cost of fuel used to generate energy for test purposes at Waterford Units 1 and 2, *i.e.*, the "test energy" that is generated to test a new electric generating unit prior to normal operation. Test energy is generated prior to placing a unit in commercial operation in order to assure that the unit operates properly. This test energy would have been generated by burning oil regardless of United's curtailments, and the fuel used to generate the test energy would have been burned regardless of United's curtailment. The exclusion from LP&L's claimed additional fuel costs of the cost of fuel used to generate test energy at the Waterford Station would reduce LP&L's damage claim by $1,522,137. The Court hereby allows this exclusion.

LP&L's claimed alternate fuel damages for the period prior to April 1975 include the fuel costs incurred by LP&L in generating energy for sale to other utilities. However, some of these costs would have been incurred even if United had not curtailed and are therefore not a result of United's breach of contract. LP&L has recovered from other utilities the fuel costs for which LP&L seeks damages. As a result of the foregoing, LP&L's damages should be reduced by $5,129,369.

United claims a reduction of LP&L's alternate fuel claim due to allocation of generation at Sterlington using gas supplied by Louisiana Gas Purchasing Corporation.

In August 1971, after United had begun to curtail, LP&L entered into a contract with Louisiana Gas Purchasing Corporation ("LGP") to purchase gas for use at its Sterlington station at a fixed price of 48 cents/Mcf or 46.8 cents per million Btu for a 20-year term. At the time of the LGP contract, August 1971, LP&L was already converting Sterlington Unit 6 to burn oil and Waterford Units 1 and 2 were under construction as oil burning units. Other oil burning units were being constructed on the Middle South system and all Middle South companies were converting units from gas-burning to oil-burning capability. It should have been clear to LP&L in 1971 that substantial amounts of oil generation would be used on the Middle South system and that generation at Sterlington using LGP gas would be cheaper than this oil generation.

Under the normal method of allocation in the Middle South system, LP&L would have been entitled to retain all energy generated from the LGP gas if that energy were cheaper than other energy sources available to it. Instead of allocating the LGP gas in the manner in which all other energy sources on the Middle South system were allocated, LP&L entered into a special arrangement with the other companies in the Middle South system to allocate the generation using LGP gas. As a result of this ar-

rangement, LP&L was limited to taking only approximately 35% of the generation using LGP gas. If LP&L had not entered into the special arrangement, it would have been able to displace many of the more expensive replacement energy sources contained in its damage claim against United and to reduce the overall fuel cost to its customers. It was imprudent for LP&L to enter into this arrangement; it should have been apparent to LP&L that the arrangement would result in higher fuel costs for LP&L than if LP&L had retained the LGP gas and allocated it according to the method used for all other energy sources on the Middle South system. If the energy from the LGP gas burned at Sterlington had been allocated in the manner utilized for all other energy sources on the Middle South system, LP&L's damages would have been reduced by $4,987,006, as reflected in testimony and United Exhibits 784 and 785. Therefore, the Court will allow this reduction of LP&L's alternate fuel claim.

United claims reduction of LP&L's alternate fuel claim due to calculation of United's Maximum Delivery Obligation at Ninemile Point in months when Texaco curtailed. The contract between United and LP&L provides that United's maximum daily delivery obligation is one-third of the fuel requirements of Ninemile Units 1-4, not to exceed 80,000 Mcf per day. For the period through the end of 1978, LP&L calculated United's delivery obligation as one-half of the actual fuel deliveries of Texaco, the other supplier to Ninemile Units 1-4, whose delivery obligation was to supply two-thirds of the fuel requirements. Beginning in January 1979 and continuing through December 1981, LP&L ceased to calculate United's delivery obligation based on actual Texaco deliveries and instead constructed a hypothetical delivery obligation based upon what LP&L alleges Texaco would have delivered if Texaco had not been in curtailment. The hypothetical Texaco delivery for 1979, 1980 and 1981 is substantially greater than Texaco's actual deliveries in 1977 and 1978. If LP&L's damage claim were

calculated for the years 1979-81 using one-third of the total fuel burned at Ninemile Units 1-4 as United's delivery obligation, a calculation generally consistent with the manner in which United's obligation was calculated for the years 1971-1978, LP&L's damage claim against United would be reduced by $10,819,212. The Court will allow this reduction.

LP&L concedes that additional fuel costs should be included in its calculation of damages only if the fuel cost was incurred as a result of United's curtailment and that an hourly calculation of damages would be more realistic than a monthly calculation. Generation on the Middle South system is dispatched and accounted for on an hourly rather than a monthly basis. However, LP&L has calculated fuel costs on an aggregate monthly basis which fails to distinguish between fuel LP&L would have had to burn regardless of United's curtailment and fuel that was burned as a result of United's curtailment. To eliminate this inaccuracy, United has calculated damages on an hourly basis. In doing so, United used precisely the same methodology as LP&L employed in its monthly analysis and used actual operating data rather than hypothetical figures. For the period March 1976 through February 1980 LP&L claims damages based on the monthly analysis of $52,939,889. The record reflects that during this period, $14,874,170 of LP&L's alleged damages were costs that would have been incurred even if United had not curtailed. Accordingly, the Court will allow a reduction of $14,874,170. The record does not support any further reduction in the alternate fuel costs using an hourly analysis rather than a monthly analysis.

LP&L is making a claim against United for $2,238,268 for the cost of the Phase I conversion project, undertaken in 1970 and completed in 1971, to convert Sterlington Unit 6 to burn oil. In 1969, LP&L sought and obtained an agreement from United to reduce deliveries at Sterlington because LP&L expected to be able to buy gas from other

suppliers on more favorable terms. Contrary to its expectations, LP&L was unable to obtain adequate quantities of gas from other suppliers for the Sterlington station. The Phase I conversion of Sterlington Unit 6 was designed to permit LP&L to operate the unit using oil for short periods of time. LP&L decided to undertake the Phase I conversion of Sterlington Unit 6 in the summer of 1970—before any curtailment by United—because LP&L had insufficient gas under contract from all sources to permit temporary operation of the Sterlington station at a high level of production.

LP&L is making a claim against United for $2,481,409 for the cost of the Phase II conversion of Sterlington Unit 6. The Phase II conversion was undertaken in 1974 and was expected to be completed in 1976. Its purpose was to permit the unit to burn oil on a continuous basis at full capacity. Even if United had not been in curtailment, the maximum deliveries by United under the Sterlington contract plus that available from other suppliers would not have been adequate for the Sterlington station in the 1970's. The Phase II conversion would have been necessary in any event.

LP&L is making a claim against United for $13,037,968 for the cost of converting Ninemile Units 1-3. The conversion was undertaken in 1973 and completed in 1977. These units were equipped with the ability to burn oil before conversion and did so. The conversion was designed to permit the units to burn oil at full capacity on a continuous basis.

As pointed out by the Court in its discussion of Phase I and Phase II conversion of Sterlington Unit 6, the conversion of Ninemile Units 1-3 would have been necessary in any event. Furthermore, the Court is of the opinion that this conversion process was not within the contemplation of the parties at the time of the confection of the contract, or considered as a possible element of damages

even if the contract was breached. Therefore, the Court will not allow damages claimed by LP&L for cost of converting generating facilities.

LP&L is claiming damages against United for $137,862,000 on the theory that it lost 74 megawatts of generating capacity at Ninemile Units 1-3 and Sterlington Unit 6 as a result of burning oil because of United's curtailment. LP&L measures its lost capacity by subtracting the alleged capacity of the units when burning oil ("oil capacity") from the alleged capacity when burning gas ("gas capacity"). LP&L then calculates its damage claim by multiplying the 74 megawatts allegedly lost by $1,863,000, the cost per megawatt of Waterford Unit 3, a nuclear unit currently under construction. The evidence shows that at the time LP&L entered into the Sterlington contract (1956) and the Ninemile contract (1968), it believed that the units would all be capable of reaching full capacity on oil if appropriate oil-burning equipment was installed. Waterford Unit 3 was planned in 1969, before curtailment and before capacity was lost. It was never planned as a replacement for capacity allegedly lost.

The Court is of the opinion that any loss in capacity at the Ninemile or Sterlington stations due to the burning of oil was not within the contemplation of the parties at the time of the contracts and hence any cost of such loss is not recoverable in damages. Furthermore, not only the nature or category of the claimed damages, but the extent or amount of such damages, must have been, or must reasonably be supposed to have been, within the contemplation of the parties when they entered into the contract in order for such damages to be recovered. The costs asserted by LP&L for lost capacity were far beyond the parties' contemplation, at the time the contracts were entered into, of the costs of replacing any lost capacity. For the foregoing reasons, no damages should be awarded for lost capacity.

LP&L is claiming damages for $5,126,760 for additional costs of maintaining its generating units as a result of United's alleged breach of contract. In calculating its claim, LP&L used stationwide average maintenance costs, which included maintenance costs for units not served by United.

LP&L has not met its burden of proving that it incurred any increased maintenance costs as a result of United's breach of contract. United fulfilled its delivery obligation at Sterlington under its contract from January 1, 1975. Increased maintenance costs at Sterlington after that date are not the result of United's breach of contract. After 1979, Texaco curtailments caused the vast majority of oil burned at Ninemile. Increased maintenance costs at Ninemile after that date are not the result of United's breach of contract. Any compensable damages for increased maintenance costs due to oil burning and resulting from United's breach of contract should be measured in accordance with the amount of oil actually burned and the actual additional maintenance cost associated with burning oil. For the foregoing reasons, recovery of damages for increased maintenance costs should be limited to $208,532, as reflected by the record herein.

LP&L is claiming damages against United for $1,648,481 for the alleged increase in the cost of operating Ninemile Units 1-3.

Very little oil was burned at Ninemile Units 1-3 and Sterlington Unit 6 during most years, and a great deal of the time there was no need for oil-burning personnel to be engaged in oil-burning functions. In many years, no oil was burned in some units. United fulfilled its delivery obligation at Sterlington under the contract from January 1, 1975. Increased operating costs after that date are not the result of United's breach of contract. After 1979, Texaco curtailments caused the vast majority of oil burned at Ninemile. Increased maintenance costs at Ninemile after 1979 are not the result of United's breach of contract.

Assuming there are any compensable damages for increased operating costs, LP&L's claim should be adjusted to eliminate costs that were not incurred as a result of United's breach of contract and to eliminate damages based on salary costs for personnel who were not engaged in oil burning. For the foregoing reason, damages awarded for increased operating costs should be limited to $289,676, as reflected by the record herein.

Accordingly, the Court is of the opinion that LP&L should be awarded damages under its breach of contract claim in a total amount of $40,309,142. This award includes damages of $39,810,934 for alternate fuel costs, $208,532 for additional maintenance costs and $289,676 for increased operating costs.

No damages should be awarded for conversion costs or lost capacity.

No damages should be awarded under LP&L's tort claim.

United contends that the plaintiffs are not entitled to prejudgment interest on any award of damages. The Court is of the opinion that the plaintiffs are entitled to judicial interest from the date of judicial demand until paid. With respect to the damages awarded to NOPSI and the City/Class, the Court holds that the date of judicial demand of the alternate fuel claim is the filing of the original petition, whereas the date of judicial demand of the claim for taxes is the filing of the amended petition. With respect to the damages awarded to LP&L, the Court holds that the date of judicial demand is the filing of LP&L's original petition for damages.

The City/Class and NOPSI have stipulated and agreed that the alternate fuel cost in the amount of $43,176,713 was paid by the ratepayers of NOPSI and should be returned to those ratepayers. Both the City/Class and NOPSI claim they are entitled to recover damages for increased franchise and receipts taxes in the sum of $1,226,393. The

Court will determine how much of the damages awarded to LP&L represent damages passed through to LP&L's ratepayers and therefore should be returned to those ratepayers. The Court will require the assistance of LP&L and the LPSC to make this determination.

Therefore, all amounts of damages awarded to the plaintiffs in these consolidated cases shall be deposited in the registry of the Civil District Court for the Parish of Orleans for distribution pursuant to further orders of this Court after an evidentiary hearing.

The Court will rule on such matters as attorneys fees, expert fees and other additional related costs in future appropriate proceedings.

The Court will issue further orders with respect to additional notices to the Class members upon the commencement of post-trial proceedings.

Judgment will be rendered accordingly.

New Orleans, Louisiana

August 24, 1984

(Sgd) George C. Connolly, Jr.
Judge

George C. Connolly, Jr.
Judge

A TRUE COPY

/s/ E.T. Dolese

DEPUTY CLERK CIVIL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LA.

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 579-040 DIVISION "J" DOCKET NO. 4

LOUISIANA POWER and LIGHT COMPANY
vs.
UNITED GAS PIPE LINE COMPANY
and PENNZOIL COMPANY

JUDGMENT

This cause having been heretofore heard and submitted to the Court for adjudication and the Court considering the law and the evidence and for the written reasons herein filed and made part of the record:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of the plaintiff, Louisiana Power and Light Company, and against the defendant, United Gas Pipe Line Company, in the amount of $39,810,934.00 for alternate fuel cost, $208,532.00 for added maintenance costs, and $289,676.00 for added operating costs, making a total of $40,309,142.00, together with legal interest from date of judicial demand, until paid, and for all costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the petition of intervention filed by the Louisiana Public Service Commission be recognized and that the Louisiana Public Service Commission be permitted to participate herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Louisiana Power and Light Company and the Louisiana Public Service Commission shall present evidence as to distribution of the amounts awarded herein at a post-trial proceeding.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the matter of attorney fees, expert fees and all other additional related costs be continued for further evidence in future appropriate proceedings herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the total amount of the above judgment shall be deposited in the registry of the Civil District Court for the Parish of Orleans, State of Louisiana, subject to the further orders of this Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all other demands herein be dismissed.

JUDGMENT READ, RENDERED AND SIGNED IN OPEN COURT AUGUST 24, 1984.

(Sgd) George C. Connolly, Jr.
Judge

George C. Connolly, Jr.
Judge

A TRUE COPY

/s/ E. T. Dolese

DEPUTY CLERK, CIVIL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LA.

APPENDIX D

The Supreme Court of the State of Louisiana

LOUISIANA POWER & LIGHT COMPANY

vs. NO. 88-C - 0406

UNITED GAS PIPE LINE COMPANY

and PENNZOIL COMPANY

IN RE: United Gas Pipe Line Co.; Applying for Writ of Certiorari and/or Review; to the Court of Appeal, Fourth Circuit, Number CA-3614; Parish of Orleans Civil District Court Div. "J" Number 579-040

April 4, 1988

Denied.

LFC

JAD

PFC

WFM

JCW

HTL

Supreme Court of Louisiana

April 4, 1988

/s/ FRANS J. LABRANCHE JR.
Clerk of Court
For the Court

APPENDIX E

31 FERC [¶ 61,336]

United Gas Pipe Line Company, Docket Nos. RP71-29-003 and RP71-120-000 (Phase III)

Opinion No. 237; Opinion and Order Affirming Initial Decision

(Issued June 19, 1985)

Before Commissioners: Raymond J. O'Connor, Chairman; Georgiana Sheldon, A. G. Sousa, Oliver G. Richard III and Charles G. Stalon.

[Note: Initial Decision of the presiding administrative law judge on Proposed Tariff Provisions, issued September 14, 1982, appears at 20 FERC ¶63,070.]

Appearances

W. DeVier Pierson, Peter J. Levin, John R. Hutcherson, David J. Hill, and Terence J. Keeney for United Gas Pipe Line Company

Wm. Warfield Ross, Lewis M. Popper, and *Janet M. Robins* for Gulf States Utilities Company

Andrew P. Carter and *Terrence O'Brien* for Louisiana Power & Light Company

Clayton L. Orn for Mississippi Power & Light Company and New Orleans Public Service Inc.

Sherwood W. Wise for Mississippi Power & Light Company

Stephen M. Hackerman for Pennzoil Company

John T. Miller, Jr. for Texasgulf Inc.

Alvin Adelman for The Brooklyn Union Gas Company and Elizabethtown Gas Company

Donald R. Mintz and *Constance Charles Willems* for the City of New Orleans and Blake G. Arata, David S. Cressy and Jacob Taranto, III

Marshall B. Brinkley and Stephen G. Bullock for Louisiana Public Service Commission

Eaton A. Lang, Jr. for Mississippi Power Company

William A. Allain and *Bennett E. Smith* for *Mississippi Public Service Commission*

John F. Harrington for Texas Gas Transmission Company

Joel M. Cockrell, Glenn S. Krassen, Andrea Wolfman and *Douglas Crockett* for the Staff of the Federal Energy Regulatory Commission

[Opinion No. 237 Text]

This phase of the United curtailment proceeding[1] at its core involves consideration of whether certain exculpatory provisions in United's tariffs filed with the Federal Power Commission (FPC) and this successor agency may deny recovery of damages claimed by its direct industrial customers arising from United's curtailment and whether a revised exculpatory clause proposed by United may be adopted and made effective as of November 14, 1971.

Our focus is upon the initial decision of Presiding Administrative Law Judge Sherman Kimball, issued September 14, 1982,[2] responding to the Commission's hearing order of August 9, 1978, which delineated the scope of

[1] Phases I and II (the 1975-76 interim curtailment plan and the permanent plan) were the subject of Opinion Nos. 150 and 150-A, 21 FERC ¶61,016 (1982) and 21 FERC ¶61,224 (1982), which were vacated and remanded in part in *Mississippi Power & Light Co. v. F.E.R.C.*, 724 F.2d 1197 (5th Cir. 1984).

[2] 20 FERC ¶63,070 (1982).

the proceeding. The decision is cogent, thorough, and is affirmed with little modification.

I. Background

The initial decision contains a very detailed history of the United curtailment case which needs no elaboration. Certain facts require emphasis for an understanding of our discussion, however.

United's system gas supply became insufficient to meet its customers' requirements in 1970. Continuous curtailment of deliveries by United commenced on November 3, 1970. Tariff sheets that had been part of United's FPC approved tariffs since 1952 contained section 12.1, which authorized United to prorate (i.e., allocate) deliveries of gas to "Buyers" (meaning jurisdictional customers) without incurring liability.[3] In April 1971, United sought to broaden the protection of the exculpatory clause by filing proposed revised Section 12.1, which essentially replaced the term "Buyers" with the term "customers." The judge concluded in the initial decision before us that, by this change, United was seeking to shield itself from liability to its nonjurisdictional, direct industrial customers for failing to deliver full contract entitlements. At that time, United also proposed a new section 12.3, designed to protect United from liability under direct sales contract provisions by which United had obligated itself to pay some of its customers' costs of burning alternative fuel due to interruptions in service (substitute fuel clauses).

In two opinions, the FPC refused to accept either revision on the grounds that they were unnecessary. The FPC concluded that all contract liability would be obviated

[3] One issue in this proceeding is whether, as the judge determined, "Buyers" means jurisdictional customers only.

by adherence to Commission curtailment orders.[4] This action was vacated by the reviewing court.[5]

The FPC reconsidered its views in Opinion Nos. 647 and 647-A [49 FPC 179, 1211] in light of the court's decision and again concluded that revisions to section 12.1 and adoption of the proposed new section 12.3 were unnecessary. It reasoned that because United was not guilty of imprudence or willful misconduct related to its curtailments, no contract liability could attach in the absence of negligence, bad faith, or wrongful conduct. The Commission also interpreted potential liability under the substitute fuel clauses, finding that liability was limited to a maximum of seven days. But this interpretation was of no consequence since the Commission also reaffirmed its opinion that United could not be liable for damages arising out of authorized curtailments in any event.

Opinion Nos. 647 and 647-A were vacated and remanded by the court in a decision which generally defined the scope of the present inquiry.[6] The court criticized the FPC for speculating about United's legal liability. It stated, in essence, that liability, if any, would be determined by the state and federal courts in which civil suits for curtailment related damages were pending. The proper inquiry, the court determined, should start from the hypothetical assumption that United is generally liable for curtailment damages and also liable for damages under the substitute fuel clauses. The Commission should then determine what effect United's proposed exculpatory clauses (if adopted) would have on removing such liability. The court focused upon the substitute fuel clauses and referred to the Commission the questions of whether the clauses were unduly

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[4] Opinion No. 606, 46 FPC 786 (1971), and Opinion No. 606-A, 46 FPC 1290 (1971).

[5] *International Paper Co. v. F.P.C.*, 476 F.2d 121 (5th Cir. 1973).

[6] *State of Louisiana v. F.P.C.*, 503 F.2d 844 (the Cir. 1974).

discriminatory, whether section 12.3, if adopted, would abrogate the clauses, and, if so, whether the result would unduly prejudice or disadvantage anyone.

Phase III was subsequently severed from the remainder of the curtailment proceeding. The issues referred by the court were refined by the Commission in an order[7] specifically limiting the scope of Phase III to seven enumerated issues:

1. Is it within the Commission's jurisdiction and authority under the Natural Gas Act to approve proposed section 12.3 as a part of United's curtailment tariff?

2. If the answer to question 1 is "yes," should section 12.3 be approved?

3. If so, what should be the effective date of such provision?

4. What would be the effect of section 12.3 upon United's potential contract liability? Specifically, would approval of section 12.3 effectively abrogate the substitute fuel clauses contained in the contract between United and certain of its customers?

5. If so, would this serve to grant any undue preference or advantage to any person or subject any person to undue prejudice or disadvantage within the meaning of Section 4(b)(1) of the Natural Gas Act?

6. Do any other of United's tariff provisions or any general or specific orders of the Commission remove or limit United's potential contract liability?

7. Would the awarding of damages for United curtailments grant the recipients thereof an undue preference or advantage in contravention of the Natural Gas Act?

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[7] "Order affirming Ruling of Presiding Judge, Granting in Part and Denying in Part Motions to Lodge, Denying Motion for Initiation of Rulemaking Proceedings and Clarifying Scope of Proceeding," 4 FERC ¶61,151 (1978).

II. The Initial Decision

As discussed below, the judge made a limited review of the facts and circumstances surrounding United's supply shortages leading to the curtailments in question. The judge correctly saw his primary duty to be to address the seven issues.

Rejecting the direct industrial intervenors' contentions that adoption of section 12.3 would involve only an exercise of Section 4, Natural Gas Act (NGA) rate jurisdiction (which does not extend to direct sales), the judge concluded that section 12.3 is not a tariff rate provision but would be part of the curtailment plan and within the Commission's NGA section 4(b)(1) jurisdiction, as contemplated by the Supreme Court in affirming the Commission's jurisdiction over curtailment of direct sales.[8] Concomitantly, he found that direct sales contract provisions imposing contact liability for its customers' costs in using substitute fuels instead of gas after November 14, 1971, would be contrary to Section 12.3, if adopted, and would be abrogated.

The judge responded to the second issue, whether section 12.3 should be adopted, by finding that it should not be approved, because, as proposed, the clause would appear to exculpate United for its own negligence or willful misconduct. Rather, he concluded that it should be revised so that United would not be protected if an action against it resulting in liability were grounded in negligence, gross negligence, or willful misconduct.

Because the court decided that the FPC made a legal error by requiring deletion of section 12.3, the judge found that establishing the effective date of a revised section 12.3 as November 14, 1971 (the date it would have become effective but for rejection by FPC Opinion No. 606 on

[8] *F.P.C. v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972).

October 5, 1971), was not prohibited. Rather, it would be an appropriate rectification of an error.

After reviewing testimony of United's and intervenors' witnesses recounting the history of the substitute fuel clauses, the judge responded to the fourth issue, by finding that approval of the appropriately modified section 12.3 would effectively abrogate the substitute fuel clauses after November 14, 1971, if the shortages were not due to United's negligence, gross negligence or willful misconduct. Moreover, to the extent United remained liable under the substitute fuel clauses, he found liability to each direct customer would be limited, under the terms of the clauses, to a maximum of seven days of substitute fuel costs.

In the judge's opinion, approval of the modified Section 12.3 and the operation of 12.1 would not grant any preference or advantage or subject any person to prejudice or disadvantage.

The issue of the effect of other tariff provisions, that is, other than sections 12.1 and 12.3, on United's potential liability required review of section 11 of United's tariff, which limits United's obligations in *force majeure* situations. The judge, found, however, that section 11 was inapplicable to curtailments.

The judge also determined that section 12.1, as originally approved in 1952, would apply only to jurisdictional customers ("Buyers"), not to the direct customers that have sued United. The revised version of 12.1, if modified to permit imposition of liability for negligent or willful misconduct and if made effective as of November 14, 1971, would preclude liability to all customers, provided that (1) curtailments were in accordance with the interim curtailment plans ordered in effect by the FPC or the Fifth Circuit and that (2) curtailments were determined by the courts not to have been the result of negligence or misconduct.

One issue raised before the judge was whether the scope of the proceeding should include findings by the Commission on United's conduct, particularly its acquisition and management of reserves and its adding more service during the period immediately preceeding commencement of curtailments.

United argued that the judge should find that shortages on its system were not attributable to its negligence or misconduct. The judge ruled, however, that the inquiry at hand was directed to the justness and reasonableness of the tariff provisions at issue. He decided that consideration of the facts and circumstances behind the shortage was appropriate only for deciding whether United should be allowed to invoke the processes of the Commission, or whether United's hands were so unclean that its submission should be denied. The initial decision left the ultimate question of the negligence of United's conduct unresolved.

Nevertheless, in the course of surveying the facts and circumstances of the shortages, the judge did identify several major areas involving action or inaction on United's part which arguably contributed to system shortages. Although refraining from weighing responsibility for the shortages, he concluded that the shortages were the result of both external factors (the well-documented nationwide shortages of gas affecting all pipelines) as well as, to some degree, United's conduct. But, he found there were no facts or circumstances to warrant withholding approval for sections 12.1 and 12.3, as revised.

In an order clarifying its August 9, 1978, order, the Commission indicated that evidence could be received concerning the nature of the claims in the damage suits pending against United. 9 FERC 61,284 (1979). Thus, the last portion of the initial decision is devoted to examining the claims and commenting on the propriety of court awards of damages, if made, based on various elements of damages sought by the plaintiffs. United's financial health also

was reviewed to ascertain the impact of the award of damages, if such were to occur. The initial decision finds that if all claims were awarded (over $1.9 billion), the amount would be approximately twice United's net assets at the time of the initial decision.

III. Exceptions to the Initial Decision

Twelve briefs were filed taking exception to the initial decision[9]; these generated nine briefs opposing those exceptions. One participant, Gulf States Utilities Company filed a notice of withdrawal after reaching a settlement in its damage suit with United in 1982.[10]

United and its former parent corporation, Pennzoil Corporation, principally attack the judge's restrictive view of the scope of the proceeding. They argue that he should have determined that from the facts and circumstances, United was not negligent or otherwise culpable; and that, therefore, the imposition of an award of damages for curtailments would be barred by United's tariff and orders of the Commission and the courts pertaining to curtailment. In short, they ask that the Commission evaluate United's management conduct relating to the development of United's shortages in this proceeding. United urges that a uniform federal standard of prudent management be formulated and applied.

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[9] Briefs were filed by United, Pennzoil Company, Gulf States Utilities Company, Texasgulf, Inc., Louisiana Public Service Commission, and Louisiana Power & Light Company. Briefs were also filed jointly by (1) City of New Orleans, Blake G. Arata, David S. Cressy, and Jacob Taranto, III, individually and as representatives of the class of electric ratepayers of New Orleans Public Service, Inc. (NOPSI); (2) NOPSI and Mississippi Power & Light Co., which were joined by Mississippi Public Service Commission and by Mississippi Power Company; and (3) Brooklyn Union Gas Company and Elizabethtown Gas Company.

[10] The amount of the settlement appears to be $112 million. 2 Moody's Public Utility Manual 3737 (1984).

The standard United suggests would involve evaluating whether management judgment was reasonable and prudent and made in good faith based on the circumstances that existed at the time the decision was made. If management decisions were imprudently made, exculpation should be precluded only if such action is directly linked to increases in curtailments.[11] United argues that, if this standard were adopted and applied in the present case, its management's actions would be found not to have increased curtailments; hence, it would be exculpated.[12]

United alleges several other errors by the judge: (1) refusing to deny as violations of the NGA any damage awards which are not based on out-of-pocket expenses, any damage awards which would duplicate already recouped expenses, anti-trust damages, and attorney fees, and many of the damage claims elements related to Texasgulf's Bully Camp sulfur extraction operation; (2) failing to find that section 12.1 applied to direct industrial customers prior to November 14, 1971; (3) finding section 11 (*force majeure*) of United's tariff not applicable to its curtailments; (4) recommending that, if damage awards have an adverse impact on United's ability to continue delivering services, subsequent proceedings should be established, rather than attempting to consider the impact in this proceeding; and

[11] United Br. on Ex. at 9.

[12] This argument, however, depends upon the Commission's assuming the task of assessing management prudence and then rejecting the judge's statements concerning several areas of facts and circumstances (*e.g.*, termination by United of gas purchase contracts in East Bastian Bay, disregard by United of warnings about reserve production ratios and reserve deliverability life in a 1968 Arthur D. Little Company Study, failure by United to be in full compliance with the regulations in reporting reserves in its Form 15 reports, use of interstate gas in the intrastate New Orleans District Five portion of United's system, and expansive sales policies by United in the mid-1960's). The judge's statements imply that United's actions in these areas are attributable to improper management decisions and have a relationship to the curtailments United's customers experienced.

(5) recommending that United be prohibited from recovering through its rates damage awards based on negligence or misconduct.

The direct sale industrial intervenors and The City of New Orleans[13] principally object to the findings that: (1) declared sections 12.1 and 12.3 (as modified) could be approved without being unduly discriminatory or prejudicing the intervenors; (2) approved the modified sections; (3) determined that the Commission has jurisdiction to approve them in a tariff that would apply to their direct industrial sales contracts; (4) concluded that the tariffs could be made applicable retroactively to November 14, 1971; and (5) concluded that awards of damages based on various elements of damages claimed by the intervenors in their damage suits would violate the NGA.

New Orleans Public Service, Inc. (NOPSI) and Mississippi Power & Light (MP&L) claim error in the judge's finding that liability under substitute fuel clauses is limited to seven days.

Louisiana Power & Light Company (LP&L) claims that the judge erroneously placed the burden on the intervenors rather than United to show the justness and reasonableness of the proposed tariff provisions.

Texasgulf objects to quoting from an FPC order of November 22, 1972,[14] which stated that Texasgulf had grossly disregarded curtailment allocation limits. Texasgulf argues that a *pro forma* statement in an ordering paragraph declaring that the order was "without prejudice to any claims or contentions which may be made by Texas gulf," was

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[13] The group of intervenors consisting of The City of New Orleans, Blake G. Arata, David S. Cressy, Jacob Taranto III, individually and as representatives of the class of electric ratepayers of NOPSI.

[14] 48 FPC 121 (1972). The order partially granted a Texasgulf petition for extraordinary relief and required payback of volumes taken by Texasgulf in excess of its curtailment allocations in 1970 and 1971.

a determination that the order would not be used against Texasgulf in any proceedings. Texasgulf claims that the initial decision violates this alleged prohibition. Texasgulf also suggests that Opinion No. 150 requires findings in this phase of the proceeding concerning when United knew or should have known that it would have to curtail firm service.

Staff presents two exceptions: (1) there should be findings that United violated Section 7 of the Natural Gas Act by introducing interstate gas into the intrastate New Orleans District 5 portion of its system; and (2) the judge used a standard of whether United had "clean hands" to determine if sections 12.1 and 12.3 should be approved. According to staff, use of this standard suggests a finding of no negligence or misconduct—a finding which is outside the scope of the proceeding and not consistent with the evidence, particularly the evidence concerning United's conduct regarding District 5 reserve releases.

IV. Discussion

A. Scope of the Proceedings

At the outset, we will consider whether the judge is correct in determining that conclusions should not be drawn concerning prudence, negligence, or willful malfeasance of United's management regarding acquisition and management of reserves and enlargement of service during the seven to ten years prior to the onset of United's curtailments.

The judge's analysis of the scope is correct. United's argument should have been raised in a request for rehearing of the August 9, 1978 hearing order.[15] In any event, we reject the argument as ill-founded. United seeks

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[15] As noted by the judge, no rehearing was sought from the order of August 9, 1978, defining the scope of the proceeding. 20 FERC ¶61,070, at p. 65,288.

a decision going well beyond the limits on the scope set forth in the hearing order. It relies upon dicta from two court opinions, one of which was previously argued and rejected by the Commission in issuing the order of August 9, 1978,[16] in an attempt to convince us that there is no legal barrier to reaching ultimate conclusions on United's prudence. Both decisions recognize that the construction of exculpating tariff provisions and the reasonableness of the adoption of such provisions are in the Commission's primary jurisdiction.[17] Extrinsic evidence may be necessary to determine the meaning and the proper circumstances where the language should be applied.[18] But, neither decision suggests that, once the operation of a tariff provision has been analyzed (as the judge has done in the instant case) and the circumstances outlined in which the provisions would or would not apply, the Commission should take the next step and make as to whether United was imprudent or negligent.

To do so would be inconsistent with law of this case, which is set forth in State of Louisiana decision. In that decision, the court criticized the FPC for making ultimate conclusions on United's liability. The court emphasized that the FPC started with the wrong inquiry. Rather than concentrating on what contract damage liability should be imposed on United, the Commission on remand was directed to assume, *arguendo,* that United is liable, then determine the effect of the exculpatory clauses based on that assumption. In other words, the first step, the determination of whether United's management's actions or inactions concerning its shortages meet the elements of common-law negligence, are not for the Commission to

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[16] *Mississippi Power & Light Co. v. United Gas Pipe Line Co.,* 532 F.2d 412, 420 (5th Cir. 1976), *cert. denied,* 429 U.S. 1094 (1977).

[17] *United States v. Western Pacific Railroad Co.,* 352 U.S. 59, 63 (1956).

[18] *Id.* at 66.

make in this case. They are for the courts to decide,[19] as the judge correctly found.

United argues that the prudence of United's curtailment related conduct is analogous to the issue of prudence of purchasing practices by other pipelines which is being considered in several PGA proceedings. The present case, however, is different from a PGA case, in which the entire proceeding is devoted to determining the propriety of passing gas supply costs on to consumers. Under section 601 of the Natural Gas Policy Act of 1978 (NGPA), the Commission is given express statutory authority to determine whether a pipeline's management recklessly disregarded its fundamental duties in acquiring reserves.[20]

We cannot ignore our obligation to establish rates based upon prudently incurred costs, but we reject United's attempts to draw us into the area of deciding whether conduct leading up to curtailment was prudent. Determinations in that area would thrust the Commission into the role of making findings that would be tantamount to determining whether or not United has been negligent. This is precisely what the court said in *State of Louisiana* should not be done.

B. Facts and Circumstances

The judge decided that two reasons exist for a limited survey of the facts and circumstances giving rise to United's curtailments and the nature of the damage claims pending in the courts. First, the survey would provide a background or framework necessary to place the legal controversy in context. Secondly, it would be a basis for de-

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[19] *State of Louisiana v. F.P.C.*, 503 F.2d 844,867 (5th Cir. 1974).

[20] The Commission also has rejected the prudence standard in PGA proceedings involving the question of whether gas acquisition costs should be automatically passed on under section 601. *Columbia Gas Transmission Corporation*, 26 FERC ¶61,034 (1984), *reh'g denied*, 26 FERC ¶61,334 (1984).

termining whether United's hands were "unclean," thereby requiring its submissions (i.e., sections 12.1 and 12.3 as offered by United) to be rejected.[21]

It is our opinion that we need not determine whether United has unclean hands in order to decide this case. Such an inquiry is irrelevant if it is initially concluded that, as a matter of law, section 12.3 cannot be accepted as proposed, but must be modified to exclude exculpation for shortages, if any, in which United was culpable.

As a result of our findings below that Section 12.3 should be modified, we do not adopt as findings any statements of the judge that appear to be conclusions on the facts and circumstances giving rise to curtailment. Thus, the objections to perceived erroneous conclusions raised by the participants on this issue are moot.

C. Section 12.3

United does not take exception to the rejection of its proposed version of section 12.3 and to the adoption effective November 14, 1971, of the section modified to exclude liability except if resulting from negligence or willful misconduct.[22] The industrial intervenors do. They object to any exculpatory clause being made effective, particularly if it is retroactive to 1971. The basic argument is that this Commission does not have jurisdiction to approve an exculpatory tariff applicable to direct sales customers' claims, because the subject matter involves rates and not transportation from which the Commission's jurisdiction over curtailments is derived.[23]

The initial decision correctly indicated[24] that the Circuit Court has settled the issue by finding that section 12.3 is

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[21] 20 FERC ¶63,070, at p. 65,289.

[22] Br. on Ex. at 6.

[23] *City of New Orleans, et al.,* Br. on Ex. at 9; LP&L Br. on Ex. at 9; NOPSI Br. on Ex. at 22.

[24] 20 FERC ¶63,070, at p. 65,303-65,304.

not a tariff rate provision subject to NGA section 4(b)(2) but is part of a curtailment plan subject to approval under the standards of section 4(b)(1). *State of Louisiana v. F.P.C.*, 503 F.2d 844,867 (5th Cir. 1974). Thus, the issues surrounding section 12.3 arise under the Commission's jurisdiction over transportation, not rates. The Commission's jurisdiction over curtailment because of jurisdiction over transportation has been confirmed by the Supreme Court.[25]

The more difficult issue is whether we have the jurisdiction to approve a modified version of the original sections 12.1 and 12.3 to be effective as of November 14, 1971. The intervenors argue that the revised exculpatory clauses cannot have any retroactive effect without violating section 5(a) of the NGA, or the filed rate doctrine.[26] But, as noted by the judge,[27] our action here flows from an error in Opinion Nos. 606 and 606-A, which never became final because they were overturned on review. Under such circumstances, correction of the error is not a reparation in violation of the filed rate doctrine nor affected by the NGA section 5 limitation on prospective application of tariffs.[28]

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[25] *F.P.C. v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972).

[26] The Commission may not prescribe rates to recoup past losses once a tariff containing that rate has become final. *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981); *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 343 U.S. 246, 254 (1957).

[27] 20 FERC ¶63,070, at p. 65,305.

[28] The Court made this specific finding in *United Gas Improvement Co. v. Callery Properties*, 382 U.S. 223, 224 (1965), stating as follows:

> While the Commission "has no power to make reparation orders," *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591,618, its power to fix rates under section 5 being prospective only, *Atlantic Refining Co. v. Public Service Commission*, supra at 389, it is not so restricted where its order, which never became final has been overturned by a reviewing court . . . An agency, like a court, can undo what is wrongfully done by virtue of its

To determine whether the modified section 12.3 should be adopted depends to a large extent on whether it would provide an undue preference for United or impose undue prejudice or disadvantage to the intervenors or anyone else under Section 4(b)(2) of the NGA. The intervenors argue that adoption would deprive them of bargained-for contract rights[29] and disregard the disproportionately heavy curtailments they suffered.[30] This, however, is simply a restated version of the argument that contract entitlements are sacrosanct and should govern curtailment allocations.[31] During periods when curtailments are in effect pursuant to a Commission or court-ordered curtailment plan, it would be unduly preferential for anyone receiving less than his firm contract entitlements to be entitled to collect from United contract damages for the monetary equivalent of the shortages, irrespective of United's culpability. Awards under such circumstances would either directly (by being passed on through rate increases) or indirectly (through weakening the pipeline's financial condition) adversely affect the remaining customers of United. As a result, we do not believe that removing the alleged bargained-for right

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order.

The Court in *Callery* allowed the Commission to impose a new condition upon previously unconditioned producer certificates requiring refund of amounts already collected under the certificates, in essence *nunc pro tunc*, because the orders originally granting the certificates had been set aside upon review.

[29] Louisiana Public Service Commission Br. on Ex. at 68.

[30] LP&L Br. on Ex. at 28.

[31] The Commission's conclusion as to the superiority of the end use curtailment method (in the absence of the operation of free market forces) is generally expressed in Opinion No. 92, 12 FERC ¶61,129, at pp. 61,273 - 61,274, *aff'd Consolidated Edison Co. of New York v. F.E.R.C.*, 676 F.2d 763 (D.C. Cir. 1982). This conclusion also reflected in judicial decisions. *See State of Louisiana v. F.P.C.*, 503 F.2d 844,855 (5th Cir. 1974); *American Smelting and Refining Co. v. F.P.C.*, 494 F.2d 925, 936 (D.C. Cir. 1974).

to collect damages for underdeliveries during curtailment periods irrespective of the pipeline's culpability constitutes an undue preference to United or an undue burden upon the intervenors.

We therefore affirm the judge's finding that section 12.3 as modified is just and reasonable and effective as of November 14, 1971.

The City of New Orleans suggests adoption of specific language for sections 12.1 and 12.3 to avoid further conflict. No party has indicated opposition to the suggestion, and we believe that the suggestion is beneficial since the proposed language makes explicit the basis on which United would be liable. Section 12.1 shall include the following language:

> Whenever a shortage of natural gas impairs Seller's ability to fulfill the requirements of Seller's customers, then Seller may in the absence of Seller's negligence, bad faith, fault or willful misconduct without liability allocate Seller's supply of natural gas. . . .

Section 12.3 will be limited similarly.[32]

D. Section 11, Force Majeure Provision

The judge found that sections 11.1 and 11.2 of United's tariff concerning *force majeure* relief do not operate to limit United's potential contract liability, for three reasons. First, he found that the operative language of the tariff sections requires that a *force majeure* event must be outside the control of the party seeking relief. United's purported notice invoking relief is its petition for a declaratory order filed on October 26, 1970, which initiated this entire proceeding. The judge found that the petition was based

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[32] To avoid confusion, the term "allocate" replaces "prorate" in The City of New Orleans' proposed language. This is extended to make it clear that the gas will be allocated under United's effective curtailment plan instead of being distributed on a pro rata basis.

upon tightening supplies and rising demand, neither of which are "matters over which United had absolutely no control."[33] Secondly, he found that the petition of October 26, 1970, did not meet the notice requirements, because it did not specifically mention *force majeure* and because it was filed ten months after commencement of curtailments. Finally, the section could not exculpate United from actions grounded in negligence or willful misconduct.

United objects to these findings arguing that, under the judge's qualification for relief, section 11 would require that a curtailing pipeline have "absolutely" or "entirely" no control over its supply and demand. Since United concedes that "[i]t goes without saying that a pipeline controls some aspects of its supply and demand,"[34] it argues that, in a supply/demand imbalance such as exists during periods of curtailment, pipelines would be precluded under the judge's test from invoking *force majeure*. United also suggests that failing to mention *force majeure* in the notice would elevate form over substance. In addition, United suggests that the judge was confused as to the timing of the commencement of continuous curtailments and the filing of the October 26, 1970, petition. The petition was filed before continuous curtailments commenced on November 3, 1970.

By its terms, section 11 applies only to situations that are out of the control of the party seeking *force majeure* relief. We agree with the judge's findings that, inasmuch as United was not forced to add new customers or to increase service to existing customers, it cannot be said, in this instance, that a number of the essential ingredients of the curtailment were beyond the control of United. In any event, even if it could be said that the events in question were entirely beyond the control of United, sec-

[33] 20 FERC ¶63,070, at p. 65,310.

[34] Br. on Ex. at 165.

tion 11 would not operate to protect United from its own negligence, since it specifically precludes relief in those situations that a party may prevent "by the exercise of due diligence."

E. Substitute Fuel Clauses

In 1971, United requested a declaratory order in Docket No. RP71-99 construing certain clauses in contracts with its utility customers. The clauses provided for reimbursement of those customers for substitute fuel burned by them during curtailment periods. Contracts covering deliveries to Plant Sweatt and Plant Jack Watson of Mississippi Power Company (MPCO)[35] and a single contract with MP&L for deliveries to the Rex Brown Power Plant and the Baxter Wilson Power Plant are the only contracts still at issue.[36] The substitute fuel clause in the MP&L contract is set forth in the initial decision.[37] The operative language at issue is substantially similar for all three contracts and essentially provides that United is excused from buying substitute fuel oil during periods of impaired deliveries due to *force majeure* or proration, except for all fuel oil used "during any period of not more than seven consecutive days. . . ."[38]

The central issue is whether the phrase "any period" means a period during which the customer only receives curtailment allocations (i.e., one continuous period, since

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[35] Ex. 22 and 23.

[36] Ex. 25 and 731. International Paper Company, which had similar clauses in its contracts with United, entered into a settlement agreement with United and has withdrawn from participation in Phase III.

[37] 20 FERC ¶63,070, at p. 65,306.

[38] The substitute fuel clauses provide that United will pay for substitute fuel burned under two different circumstances. One is curtailment (for seven consecutive days). The other arises when United needs the gas for peak-shaving purposes. The second circumstance is not at issue here.

United was in a continuous curtailment posture during the relevant period after November 3, 1970) or repeated seven consecutive day periods, each commencing whenever curtailment allocations received by the plants covered by the contracts are changed.

The phrase in question is ambiguous on its face and cannot be construed without resort to extrinsic evidence.

NOPSI, MP&L and MPCO argue that the judge erred in finding United responsible under the clauses for reimbursement of fuel oil costs for a maximum of only seven consecutive days of curtailment (other than when requested to take less than full entitlements by United because of peak shaving requirements).

NOPSI, MP&L and MPCO present three basic objections to these findings.[39] First, they argue that the August 9, 1978, order excluded from Phase III issues involving the construction of contracts between United and its customers, and that this would necessarily exclude as well any analysis of the substitute fuel clauses. Second, they argue that their interpretation of the clauses presented by MP&L's witness Stamply[40] is consistent with the opinion in *State of Louisiana.*[41] Finally, they argue that the clauses are part of contracts found by the Commission required in the public convenience and necessity and cannot be abrogated except "in circumstances of unequivocal public necessity."[42]

Construction of contracts in general was excluded from the scope of Phase III by the August 9, 1978 order; but the fourth question at p.3, *supra,* obviously contemplates an analysis of the rights provided by the substitute fuel

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[39] 20 FERC ¶63,070, at pp. 65,306-65,308.

[40] Tr. 16,431.

[41] 503 F.2d at 868.

[42] *Permian Basin Area Rate Cases,* 390 U.S. 747, 822 (1968).

clauses as a necessary predicate for determining the effect of Section 12.3, if adopted. This reasoning is consistent with the directive in the State of Louisiana decision that we should determine what would happen with section 12.3 in effect to United's liability under the substitute fuel clauses.[43]

MP&L's assertion that the interpretation offered its witness Stamply is compelled by the court's interpretation of the clauses in State of Louisiana is incorrect. The court made no final findings on the proper interpretation. It merely illustrated its difficulty with the FPC's discussion of the fuel clauses in Opinion Nos. 606 and 606-A and suggested that more analysis was needed to understand the language in one contract it examined.

The fact that the clauses are part of contracts incorporated in transportation certificates that were found by the Commission to be in the public convenience and necessity does not exempt them from the Commission's power to abrogate contracts as an element of the overall operation of a curtailment plan. As previously discussed, our transportation jurisdiction, which includes the power to curtail direct sales,[44] necessarily includes the power to limit the financial consequences to a pipeline that curtails such sales in the approved manner. Otherwise, pipelines would be forced into the untenable situation of being required to perform acts deemed to be in the public interest at the cost of disastrous financial consequences to themselves.

While we agree with the judge's impression of the evidence given by the various witnesses testifying concerning the extent of the clauses (noting that MPCO and MP&L present no objection other than that insufficient weight was given to their witness Stamply's testimony), additional

[43] *Id.* at 867.

[44] *F.P.C. v. Louisiana Power and Light Co.*, 406 U.S. 621 (1972).

portions of the record not discussed in the initial decision lend additional support for his conclusion.

Mr. Stamply testified that if United supplied enough gas to meet a plant's needs and the plant did not have to burn fuel oil, then a new period of potential liability would start.[45] But, he also admitted that, under his interpretation, whether United is required to pay for fuel oil used in a given plant depends upon the generation requirements of the entire MP&L system.[46] In fact, under Mr. Stamply's interpretation, United's liability is actually controlled, not by the needs of the specific plant covered by one of the contracts in question, but by the Middle South Utilities, Inc. (Mid-South) dispatch operator who assigns generation responsibility to each MP&L unit.[47] A given MP&L unit may be assigned a high or a low generation requirement on a given day because of exigencies elsewhere on the Mid-South system,[48] such as repairs required to an LP&L generating unit caused by LP&L or some third party's negligence.

Under Mr. Stamply's interpretation, if the Rex Brown Power Plant temporarily stopped taking any curtailment allocations from United because it was down for repairs, upon recommencement of gas deliveries, even if at the same allocation level as before shutdown, a new liability period would commence under the applicable substitute fuel clause.[49] This illustrates the important point that whenever United is supplying less than full contract en-

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[45] Tr. 16,431.

[46] Tr. 16,437.

[47] Tr. 16,441. Middle South Utilities, Inc., is the holding company parent of LP&L, MP&L, NOPSI, and Arkansas Power & Light Company.

[48] Tr. 16,441.

[49] Tr. 16,448.

titlements for the entire Mid-South system, Mid-South could alter generation unit requirements throughout its system to make United continuously liable under the contracts covering deliveries to only two units.[50]

The ability of the entire Mid-South system, not merely MP&L, to structure its generation responsibility so as to control United's liability[51] is inconsistent with the testimony of MPCO's witness Bell, who stated that the clauses were "intended to provide a short range emergency fuel supply in the event of an inability of United to supply gas to *the plants under the contracts.*" (emphasis added.) Furthermore, the Stamply interpretation would allow a result completely at odds with the testimony of United's witness Porter, who stated that the seven day limitation had been adopted because United did not want to assume the unlimited liability that would be allowed by Mr. Stamply's interpretation.

We therefore affirm the finding of the judge that United's liability under the substitute fuel clauses is limited to seven days during a continuous period of curtailment.

F. Comments of the Judge on the Nature, Extent and Theory of Damage Claims Against United

The judge reviewed in detail the nature or theory of elements of various damage claims pending in the court proceedings against United. His comments were for the purpose for making sure the Commission was fully informed but were not intended to be the basis for any ultimate findings.[52] He then proceeded to discuss the ap-

[50] Tr. 16,448; as noted by the judge, witness Bell also testified to the same effect.

[51] Although MPCO's witness Bell did not so state, it appears that the same is theoretically possible for MPCO, since it owns or has an interest in a number of plants other than those covered by the contracts in question. Tr. 14,635 and 14,366; 2 Moodys Public Utility Manual 3484 (1981).

[52] 20 FERC ¶63,070, at p. 65,313.

propriateness of the various damage claims and suggested that certain claims (e.g., damages claimed for which there has been no actual out-of-pocket expenses, treble damage claims, or claims for attorney's fees) do not have a reasonable basis and therefore would constitute undue preferences under the NGA.

In an order issued November 30, 1979, clarifying the August 9, 1978, order, the Commission stated that "a 'general inquiry' concerning the claims for the purpose of making ultimate judgment is unnecessary and unwarranted" and may conflict with matters more properly for courts to resolve.[53] Therefore, the judge's comments on the types of claims are not adopted as the Commission's findings.

As to whether damage awards contravene the NGA or our ability to carry out statutory functions, the judge proposes that, after all damage awards have become judicially final, a hearing should be initiated, if so requested by United, to determine whether payment of the damage awards would so adversely impact United that service would be impaired.

So far, United has settled four curtailment damage suits by total payments in excess of $112 million. At present, United faces recent potential judgments which could involve as much as $270 million.[54]

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[53] 9 FERC ¶61,284, at p. 61,228.

[54] On August 24, 1984, the Civil District Court for the Parish of Orleans in Louisiana entered a judgment in the amount of $44.4 million plus interest in favor of NOPSI, the City of New Orleans, the State of Louisiana and representatives of NOPSI's customers as a class. The same court also entered judgment in the amount of $40.3 million plus interest in favor of LP&L and its customers. The amount of the interest is the subject of further legal proceedings in the Louisiana courts. On June 4, 1985, the United States District Court for the District of Columbia entered a decision finding United liable to Texasgulf for negligence resulting in a breach of a long-term supply contract. The amount

It is conceivable that additional adverse judgments in the untried damage suits could, when added to existing judgments, require a review by this Commission of the proposed timing of payments to avoid adverse impact on jurisdictional ratepayers. However, consideration of the issue at this time would be premature.

The judge further recommends that any damage award based on negligence, misconduct or willful behavior be excluded from recovery through increases in United's jurisdictional rates by a Commission determination at this time. United argues that such a determination should be reserved for future rate cases. Moreover, it suggests that, if the damage awards are "bankrupting" in magnitude, the Commission would not want to have tied its hands. We agree with United and will not decide the issue at the present time since we would have to anticipate requests that may not be presented and events that may not come to pass.

The Commission orders:

(A) The initial decision issued on September 14, 1982, is affirmed in part and modified in part in accordance with this order.

(B) Proposed tariff sections 12.1 and 12.3, modified in-accordance with this decision, are approved as being not unduly preferential or discriminatory and shall be effective as of November 14, 1971.

(C) United shall file revised tariff sheets in conformity herewith within 30 days of the issuance of this order.

(D) Motions of LP&L, the City of New Orleans and Texasgulf for reopening the record and of the City of New Orleans for oral argument are denied.

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of liability is to be determined later. Texasgulf seeks damages totaling $100 million.

APPENDIX F

35 FERC [¶61,344]

United Gas Pipe Line Company, Docket Nos. RP71-29-030, -031, -032, -033, -034, -035, -036 and -037 (Phase III)

Opinion No. 237-A, Opinion and Order Denying Rehearing

(Issued June 17, 1986)

Before Commissioners: Anthony G. Sousa, Acting Chairman; Charles G. Stalon, Charles A. Trabandt and C.M. Naeve.

[Note: Opinion No. 237, Affirming Initial Decision, issued June 19, 1985, appears at 31 FERC ¶61,336.]

[Opinion No. 237-A Text]

On June 19, 1985, the Commission issued Opinion No. 237, 31 FERC ¶61,336, affirming an initial decision [20 FERC ¶63,070] on seven questions concerning the effect of tariff conditions upon the liability of United Gas Pipe Line Company (United) for damage claims arising out of curtailments.

The Opinion affirmed the following principal conclusions in the initial decision:

(1) The Commission has the authority to approve tariff clauses which would exculpate United from breach of contract claims, provided that the curtailments were not caused by its negligence or willful misconduct and that it conducted the allocation of gas in accordance with effective curtailment tariffs. The proposed exculpatory clauses (sections 12.1 and 12.3) were modified to conform and adopted effective as of November 14, 1971.[1]

[1] The effective date of other curtailment tariff provisions that were tendered for filing on May 17, 1971, in Docket No. RP71-120 simultaneously with sections 12.1 and 12.3 (as then proposed by United).

(2) The modified section 12.3 would remove contract liability for the use of substitute fuels by customers irrespective of whether the customers have substitute fuel clauses in their contracts. To the extent liability is predicated on negligence or willful misconduct, United would be liable only for a maximum of seven days of substitute fuel costs.

(3) No undue preference or advantage would be granted by adoption of modified sections 12.1 and 12.3 effective November 14, 1971.

(4) No other tariff provisions remove or limit United's potential contract liability. If curtailments are conducted in accordance with Commission orders approving curtailments plans, United would be exonerated from breach of contract claims in the absence of negligence or willful misconduct.

(5) The awarding of damages based on negligence or wrongful misconduct, as opposed to simple breach of contract due to adherence to Commission cr court-ordered curtailment plans, does not involve undue preference or advantage.

I. Requests for Rehearing

Seven requests for rehearing were filed. The request of Texasgulf, Inc., Docket No. RP71-120-035, has been withdrawn as a result of a settlement with United.

United and Pennzoil Company present essentially the same principal objection. They assert that the Commission erred by failing to determine the facts and circumstances surrounding United's shortage and to declare that the imposition of liability upon United is barred or limited by United's tariff provisions or Commission orders.

United also alleges the following additional errors:

(1) The Commission erred in failing to specify that a uniform Federal standard of bad faith rather than com-

mon law negligence should be applicable to curtailment damage suits.

(2) The Commission erroneously concluded that section 12.1 has applied to direct sale customers only since 1971 (rather than since its inception in 1952).

(3) The Commission was inconsistent and in error in finding the *force majeure* provision of United's tariff inapplicable to breach of contract claims.

(4) The Commission erroneously rejected the initial decision's analysis of damage claims against United.

United also requests clarification of certain ambiguities. United requests the Commission to state that tariff sheets conforming to Opinion No. 237 do not affect a substantive change in sections 12.1 and 12.3 as proposed by United in 1971. United also seeks declarations that its shortages were part of a nationwide gas shortage and that Commission orders implementing curtailments on United's system, as well as the curtailment provisions of United's tariff, bar liability in the absence of a showing that curtailments were due to its bad faith or malfeasance.

Mississippi Power & Light Company (MP&L), New Orleans Public Service, Inc. (NOPSI), the City of New Orleans,[2] Louisiana Power & Light Company (LP&L), and the Louisiana Public Service Commission (LPSC) argue that the Commission erred in finding that sections 12.1 and 12.3 should be revised and approved to be effective as of November 14, 1971. They argue that we are engaging in ordering reparations, which are prohibited.

Both the City of New Orleans and LPSC object to finding the exculpatory tariffs applicable to nonjurisdictional sales. They also object to deferral of the question of

[2] Collectively the City of New Orleans, Blake G. Arata, David S. Cressy, Jacob Taranto III, individually and as representatives of the Class of Electric Ratepayers of NOPSI.

whether United may recover court damages awards through its rates from jurisdictional customers.

LPSC asserts that, rather than finding irrelevant the presiding administrative law judge's discussion of the cleanliness of United's hands regarding the gas shortages, the Commission should have rejected the clean hands discussion on the basis that it involved matters beyond the scope of the proceedings. The City of New Orleans, however, argues that the Commission should find that United lacks clean hands and therefore is not entitled to any exculpation.

LPSC argues that the Commission erred in finding industrial intervenors would be granted an undue preference if the modified exculpatory clauses were not adopted. It also objects to the finding that the awarding of damages not based on negligence or willful misconduct would grant the recipients an undue preference.

Most of the matters raised in the requests for rehearing are a reiteration of arguments discussed and rejected by the initial decision or Opinion No. 237. Certain arguments warrant the additional discussion below.

II. Discussion

A. Review of Facts and Circumstances

United and Pennzoil raise two principal objections to the refusal of the Commission in Opinion No. 237 to review specific claims of mismanagement. These parties allege: (1) the decision in *Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 532 F.2d 412 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094 (1977), defined the Commission's primary jurisdiction to include a factual inquiry; and (2) the hearing order of August 9, 1978, included a review of facts and circumstances of the shortages in the scope of proceeding by accepting Part B[3] of the referral order by

[3] Appendix A to this order.

the United States District Court for the Southern District of Mississippi.[4] Part B requested a determination of whether in light of (i) the facts and circumstances resulting in shortages on United's system, and (ii) the Natural Gas Act and rules and regulations thereunder, the imposition of liability and an award of damages are barred or limited by sections 12.1, 12.3 or any other tariff provisions or Commission orders.

These arguments are essentially efforts to seek untimely rehearing of the hearing order of August 9, 1978, establishing the scope of the proceeding. The *Mississippi Power & Light Co.* decision does not direct that the Commission determine the facts and circumstances of United's shortages. The court only stated that "the Commission can determine in detail the facts and circumstances that resulted in the severe shortage United is experiencing."[5] The court did not *require* a determination of the facts and circumstances of United's shortages. For the reasons stated in the order of August 9, 1978, the Commission found it inappropriate to make such a determination.

The Commission in that order did accept Part B of the referral order because the issues "involved matters which are within the scope of [the Commission's] primary jurisdiction." In doing so, however, the Commission did not specifically incorporate a review of the facts and circumstances. The predicate to the questions presented in Part B is "[w]hether, in light of (i) the facts and circumstances resulting in the shortage on United's system. . . ." That phrase, however, does not independently direct a determination of the facts and circumstances. Rather, it is based on the supposition that the Commission would incorporate Part A (requesting review of the facts and circumstances)

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[4] *Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, No. J74-185(N)(S.D. Miss. April 22, 1977).

[5] 532 F.2d at 420.

into the scope of the proceeding, which the hearing order categorically rejected.

B. Force Majeure

United challenges our determination that *force majeure* tariff provisions do not protect it because its curtailments were not entirely beyond its control. United argues that it was not forced to add new customers or increase existing service immediately prior to the onset of curtailments. United contends that it had preexisting obligations to honor, and new or enlarged service was unavoidable.[6] United has failed to persuade us concerning the firmness of these commitments, however. Mr. Haynes, a witness for United, was unable to say whether the commitments were legal or moral.[7] In the opinion of another United witness, Mr. O'Leary, it was reasonable for United to expand sales during the pre-1969 period since other pipelines did the same. His testimony suggests that the new or enlarged sales were the result of business decisions, rather than binding, legal obligations.[8] Mr. Cassin, Vice President and General Counsel of United, also testified that the commitments were not legal matters. They were business matters. He stated that, the way the industry functioned at that time, even a simple commitment was to be honored.[9] In our view, the record contains substantial evidence to support the conclusion that United's commitments for new or enlarged service did not constitute binding, enforceable agreements. United, for its own reasons, decided to honor them anyway, irrespective of the consequences.

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[6] Tr 142-43, 722-25, 743, 3197, 4195, 4219, 18,787-88, Ex. 43 at p.-22.

[7] Tr. 743.

[8] Tr. 18,354.

[9] Tr. 3197.

C. Rejection of Judge's Analysis of the Damage Claims

The Commission refused to adopt comments by the judge on the nature of certain elements of damage claims asserted by plaintiffs against United in court suits. United argues on rehearing that our refusal is inconsistent with the clarifying order issued November 30, 1979. That order allowed reception at the hearings of evidence on the extent and nature of the private claims. The order, however, did not indicate that the purpose of receiving such evidence would be to resolve the damage claims themselves. On the contrary, the order noted only that "[t]he *potential* liability of United for damages *may* be relevant to resolution of the seven issues [set for hearing]." (Emphasis added.)[10]

Of the issues set for hearing, an examination of elements of the damage claims is related to only the issue of whether an award of damages might grant an undue preference or advantage contrary to the NGA. That issue, however, requires the broad answer given by the judge in Section VII of his initial decision that liability predicated on breach of contract (in the absence of negligence or misconduct) would be unduly preferential if curtailments were in accordance with an effective curtailment plan; but the opposite, if curtailments resulted from shortages caused by negligence or willful misconduct.[11]

Evaluation of the nature, extent and theory of the elements of the claims is a different matter altogether than the issue of undue preference or advantage issue. The former evaluation basically requires a determination of whether each element is allowable under the law of damages.

Application of the law of damages, however, is a matter for the courts. In fact, most, if not all, of the elements

[10] 9 FERC ¶61,284, at p. 61,628.

[11] 20 FERC at p. 65,312.

of damage claims of NOPSI and LP&L that United attacks have been discussed at length and denied by the court before whom the claims were tried.[12] The claims of Gulf States Utilities Company and Texasgulf, Inc., are now irrelevant since both have settled their suits with United. Evaluation of the damage claims of MP&L and Mississippi Power Company, which remain to be tried in the Federal District Court for the Southern District of Mississippi, would trench upon the jurisdiction of the court.

D. Approval of Sections 12.1 and 12.3 Effective November 14, 1971

The City of New Orleans, LPSC, LP&L and MP&L object to adoption of a modified form of the exculpatory clauses for which United sought approval in 1971. The modified clauses would not exculpate United from damages due to curtailments resulting from its own negligence or willful misconduct.

The intervenors make the following arguments against approving the modified proposed exculpatory clauses effective as of November 14, 1971:

(1) Approval of a modified section 12.1 is outside the scope of the proceeding.

(2) The Commission has no jurisdiction to make modified sections 12.1 and 12.3 applicable to direct sale customers.

(3) The Commission erred in revising the proposed exculpatory clauses and making them applicable when there is no negligence or willful misconduct.

(4) There is no showing of any public interest in exculpation for breach of contract.

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[12] *City of New Orleans v. United Gas Pipe Line Company,* Nos. 575-544 and 579-040, Docket No. 4, Slip. op. at 22-39 (Cir. Dist. Ct. Parish of Orleans, La., August 24, 1984).

(5) The Commission has no authority to make the modified exculpatory clauses effective from November 14, 1971.

(6) Adoption of the modified clauses would impose undue prejudice upon the intervenors.

(7) The approved langauge of the exculpatory clauses erroneously limits United's authority to allocate gas during shortages only in the absence of negligence, bad faith, or willful misconduct.

Included among the seven issues defining the scope of this proceeding was whether "any other of United's tariff provisions . . . remove or limit United's potential contract liability?"[13] Consideration of this issue implies modification of section 12.1 if required after an analysis of its effect. By its terms, section 12.1 would absolve United for damages even in the absence of willful misconduct, which would be inconsistent with the law and prior Commission precedent.[14]

The parties challenge the Commission's authority to revise and apply the proposed section 12.3 and the existing 12.1 on a variety of grounds. All of the grounds have been previously addressed in the initial decision or Opinion No. 237 except the assertion, in essence, that there is an insurmountable *hiatus* between the deletion of the original section 12.3 as a result of the erroneous determination of the FPC in Opinion Nos. 606 and 606-A [46 FPC 786, 1290] and our present adoption of a limited version of

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[13] *See United Gas Pipe Line Co.*, 4 FERC ¶61,151, at p. 61,355 (1978).

[14] 20 FERC at p. 65,304. The judge supports limiting exculpation by relying on *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955), which established the doctrine that a common carrier may not exculpate itself for liability for negligence. The Court in *Bisso* noted that it had previously declared that public policy forbade telegraph companies from such exculpation, even though they were not common carriers. 349 U.S. at 89.

section 12.3. The intervenors claim that the *hiatus* is caused by the failure of United to seek rehearing or judicial review of Opinion Nos. 606, 606-A and 647-A (the latter two Opinions rejected a subsequent United effort to offer a revised section[15]) and by the fact that the present proposed section 12.3 was not filed until March 3, 1975, in a different docket (RP75-71). Because of these factors, the intervenors argue that Opinion No. 237 violates the prohibition on reparation orders[16] by attempting to rectify final Commission orders retroactively.

The crux of the intervenors' argument is that the Commission's erroneous decisions supposedly became "final" decisions because of United's failure to appeal and, therefore, the doctrine that the Commission may correct an erroneous but not final order does not apply.[17] United's failure to appeal Opinion Nos. 606 and 606-A cannot reasonably be viewed as disqualifying, since United had no reason to appeal if the Commission had been correct in the view that adherence to an approved curtailment plan obviated contract liability. Assignment of a new docket number by Commission personnel to a United filing containing the proposed section 12.3 was a purely ministerial matter. That act certainly cannot affect United's efforts to cure the Commission's error, once it was discovered, particularly since the new docket (RP71-120) and the original one (RP71-29) were both consolidated in this Phase III for the purpose of once more considering the efficacy

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[15] United Gas Pipe Line Co., 49 FPC 179 (1973) and 49 FPC 1211 (1973).

[16] *See, e.g., Federal Power Commission v. Hope Natural Gas Co.,* 320 U.S. 591 (1944).

[17] *United Gas Improvement Co. v. Continental Oil Co.,* 381 U.S. 392 (1965); *United Gas Improvement Co. v. Callery Properties,* 382 U.S. 223 (1965); *F.P.C. v. Idaho Power Co.,* 344 U.S. 17 (1952); *Tennessee Valley Municipal Gas Association v. F.P.C.,* 470 F.2d 446 (D.C. Cir. 1972).

of United's proposed exculpatory clause.[18] The decision in *International Paper Co. v. F.P.C.*, 476 F.2d 121 (5th Cir. 1973), vacated the "absolute defense" determination in Opinion No. 606 as *"mere dicta."* The Commission's findings in Opinion 647-A, which included a finding that there was no need for an exculpatory clause, were vacated in *State of Louisiana v. F.P.C.*, 503 F.2d 844 (5th Cir. 1974). *The State of Louisiana* decision led to the present Phase III proceeding.[19]

The argument made by some intervenors that section 12.3 cannot be made part of the court ordered plan, which was effective from November 1976 to November 1982, is also misguided. The court ordered plan involved the four-category curtailment plan approved by the Commission in Opinion No. 606, which had been interrupted by the plan adopted in Opinion No. 647 in January 1973.[20] Although the court made significant adjustments in the Opinion No.

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[18] "Notice of Filing and Order Suspending Proposed Revised Tariff Sheets, Consolidating Issues in Pending Proceeding and Scheduling Distribution of Evidence," Docket Nos. RP71-29 and RP71-120, issued May 28, 1981 (unreported).

[19] It is apparent from the *International Paper Co.* decision that the court was suggesting correction of the error by further proceedings:

> We undertake to give lengthy comment on this language so that no court in the future will be misled as to the import of this language because it was in an order upheld by this circuit. We also feel that by commenting on this language at this time we will give the FPC opportunity to further act on the matter if it so desires.

576 F.2d at 125.

Courts have held that finality of administrative actions is not a mechanistic, technical decision but rather is based upon a realistic, pragmatic assessment of the nature and effect of the orders. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967); *Fidelity Television, Inc. v. F.C.C.*, 502 F.2d 443, 448 (D.C. Cir. 1974).

[20] *See Southern Natural Gas Company v. F.P.C.*, 543 F.2d 530 (5th Cir. 1976).

606 plan, the court indicated that it was reimposing essentially the Opinion No. 606 plan. Undoubtedly, United's original section 12.3 would have been part of that plan but for the Commission's legal error. Thus, the revised sections 12.3 and 12.1 can be made part of the court ordered plan as easily as they can be incorporated in the other plans subsequent to November 14, 1971.

The reasoning supporting our finding that sections 12.1 and 12.3 exonerated United for breach of contract (not involving negligence or willful misconduct), are in the public interest is adequately discussed in section II of the initial decision.[21]

LP&L objects to the language of the modified exculpatory clauses. The Commission adopted language for the revised section 12.1 suggested by the City of New Orleans.[22] LP&L believes that the language could be construed as limiting United's authority to curtail to only those periods when there is an absence of negligence or willful misconduct. On July 19, 1985, United made a compliance filing in Docket No. RP71-29-037 tendering a tariff containing the language in question in a revised section 12.1. We think it is sufficiently clear from the language contained in the filing that the exculpatory provision relates only to liability and does not limit United's operational ability to effectuate curtailments. This is consistent with our intent, as expressed in Opinion No. 237-A. Further revision of the section is therefore unnecessary.[23]

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[21] 20 FERC at p. 65,304.

[22] "Whenever a shortage of natural gas impairs Seller's ability to fulfill the requirements of Seller's customers, then seller may in the absence of Seller's negligence, bad faith, fault or willful misconduct without liability allocate Seller's supply of natural gas . . ."

[23] We agree with United's suggestion that we clarify the term "allocate" as used in the sections 12.1 and 12.3 to make clear that the term has no different meaning than the terms "curtail" and "prorate" that are used elsewhere in section 12.

In making the compliance filing in Docket No. RP71-29-037, United requested an effective date of July 19, 1985, rather than November 14, 1971, as contemplated in Opinion No. 237. The basis for the request is that the Opinion effects no substantive change in United's tariff but makes explicit what has been implicit in Sections 12.1 and 12.3 since November 14, 1971. As explained in Section II of the initial decision,[24] the modification to the exculpatory clauses eliminating protection for negligent or willful acts in causing or implementing curtailments is designed to conform to the law and to be consistent with a similar provision approved in Tennessee Gas Pipeline Company's tariff in 1977.[25]

However, even if the Filed Rate Doctrine[26] is inapplicable to exculpatory clauses in curtailment tariffs (which is an open question we do not need to now address), the continuing controversy over exculpation of United from curtailment damages (including two suits pending trial before the United States District Court for the Southern District of Mississippi) suggests that our conclusions should be embodied in filed tariffs made effective as of November 14, 1971, for clarity, if for no other reason.[27]

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[24] 20 FERC at p. 65,304.

[25] *Tennessee Gas Pipeline Company,* 57 FPC 1593 (1977).

[26] The doctrine holds that only filed tariff rates may be collected by a pipeline. *Arkansas Louisiana Gas Co. v. Hall,* 453 U.S. 571 (1981); *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.,* 341 U.S. 246 (1951); *City of Cleveland v. F.P.C.,* 525 F.2d 845 (D.C. Cir. 1976).

[27] The D.C. Circuit has recently commented that no court has squarely decided whether the Commission's waiver power may extend backward past the original filing date absent the parties' agreement and a finding of good cause. *City of Girard v. F.E.R.C.,* No. 84-1210, slip op. at 12 (D.C. Cir. May 16, 1986). However, the court relying on the decision in *Arkansas Louisiana Gas Co. v. Hall supra,* assumed that this Commission has the power to set an effective date for a rate tariff before the new rate was filed. *Id.* at 13. In addition, section 154.51 of the

The argument that we have failed to consider prejudice to the intervenors is negated by the foregoing discussion. By causing United's tariffs to conform to existing law, we may create a preference; but, as a matter of law, the result cannot be unjust or unduly discriminatory or preferential.

Several intervenors continue to insist that United does not have "clean hands" and, therefore, is not eligible for any exoneration. We adhere of our view expressed in Opinion No. 237 that the question of "clean hands" is irrelevant to a decision in this case.

Related to the "clean hands" argument is United's request that we make more explicit that United's curtailments resulted in some degree from the nationwide shortages of gas during the 1970's. United requests confirmation that the question of its conduct to be decided by the courts is solely concerned with the extent to which its conduct increased curtailments, i.e., the amount of aggravation by United of the shortage that would have occurred in any event. The degree of United's culpability and the causal connection between fault and its curtailments are all matters which are part of the legal framework of suits arising out of curtailments. They are matters for the courts rather than this Commission.

The Commission orders:

(A) Rehearing of Opinion No. 237 is hereby denied.

(B) United's FERC Gas Tariff First Revised Volume No. 1, Revised Seventh Revised Sheet No. 71 and Revised twelfth Revised Sheet No. 72 submitted July 19, 1985, in Docket No. RP71-29-037 are accepted for filing and shall be effective as of November 14, 1971.

Commission's regulations permits a gas tariff or part thereof to be effective on less than 30 days notice, which would not prevent a curtailment tariff provision to become effective prior to its filing. We find that good cause has been shown for making the revised Sections 12.1 and 12.3 effective as of November 14, 1971.

(C) Motions for reopening the record and for oral argument are denied. Motions to lodge court judgments and status reports on litigation are granted.

Appendix A

Mississippi Power & Light Company and State of Mississippi v. United Gas Pipe Line Company and Pennzoil Company, United States District Court, Southern District of Mississippi, Jackson Division, Civil Action No. J74-185(N), April 21, 1977.

Before Walter S. Nixon, Jr., Judge.

Order

This cause having come on for hearing on the motion of the defendants to refer certain issues to the Federal Power Commission for exercise of its primary jurisdiction, and the Court having received oral and documentary evidence, having received the briefs of the parties, and having heard the argument of counsel, is of the opinion that the motion should be and it is hereby granted.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the Order of April 4, 1975, be amended to provide:

(a) That there be referred to the Federal Power Commission for a full and adequate determination, articulating its rationale and supporting it with relevant findings of fact, the questions raised in this cause, including but not limited to the questions set forth in Appendix A to this Order. *Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 523 F.2d 412, 420 (5th Cir. 1976), *cert denied,* ___U.S. ___, 45 U.S.L.W. 3571 (Feb. 22, 1977);

(b) That all further actions in this cause continue to be stayed pending the Federal Power Commission's determinations on the questions referred herein and pending completion of the following proceedings before the Federal Power Commission:

(1) *United Gas Pipe Line Co.,* Docket Nos. RP71-29 et al. (Phase II);

(2) *United Gas Pipe Line Co.,* Docket Nos. RP71-29 et al. (Phase III); and

(3) Any other proceeding which the Federal Power Commission may institute in response to this Order for the purpose of addressing the questions referred herein.
IT IS SO ORDERED AND ADJUDGED, this the 21st day of April, 1977.

Appendix A to Civil Action No. J74-185(N)

Issues to Be Referred to the Federal Power Commission

A. Issues Pertaining to the Facts and Circumstances Resulting in the Shortage on United's System.

1. Whether the shortage on United's system resulted from substantial changes in the supply of natural gas available to United and in the demand for gas on United's system that were beyond the control of United or Pennzoil and that could not reasonably have been foreseen by United or Pennzoil?

2. Whether United and/or Pennzoil deliberately or negligently created the gas shortage on United's system by making commitments for service to new customers or enlarged service to existing customers after they knew or should have known that United's existing gas reserves plus those that it could reasonably expect to acquire would not meet its system requirements?

3. Whether United and/or Pennzoil deliberately or negligently created the gas shortage on United's system by the release of any natural gas reserves under contract or by the surrender of any natural gas purchase contracts?

4. Whether United and/or Pennzoil deliberately or negligently created the gas shortage on United's system by failing to make reasonable efforts to acquire new gas reserves?

5. Whether United and/or Pennzoil deliberately or negligently created the gas shortage on United's system by precluding United from direct access or direct participation in any reserves of natural gas or by improperly prohibiting United in any other manner from acquiring new gas reserves?

6. Whether United and/or Pennzoil, during negotiations of the contract between United and MP&L dated December 8, 1967, knew that United could not fulfill its contractual commitment to MP&L and others from its existing and projected supplies of natural gas and, if so, whether United and/or Pennzoil concealed this fact from or misrepresented it to MP&L?

B. Issues Pertaining to United's Tariffs and FPC Orders.

Whether, in light of (i) the facts and circumstances resulting in the shortage on United's system and (ii) the provisions and policies of the Natural Gas Act and the Federal Power Commission's rules and regulations, the imposition of liability upon United and the awarding of damages to MP&L for the curtailments necessitated by such shortage are barred or limited by:

(a) §12.1 of United's tariff;

(b) §12.3 of United's tariff;

(c) § 11 of United's tariff;

(d) any other provision of United's tariff;

(e) the Federal Power Commission's order in Docket No. CP70-222 [44 FPC 14 (1970)] certificating the sale of gas to MP&L at its Baxter Wilson Steam Electric Station and/or at its Rex Brown Electric Station;

(f) any general or specific orders of the Federal Power Commission pertaining to United's curtailment programs?

C. Issues Pertaining to the Contract Between United and MP&L.

Whether, in light of (i) the facts and circumstances resulting in the natural gas shortage on United's system and (ii) the provisions and policies of the Natural Gas Act and the Federal Power Commission's rules and regulations, the imposition of liability upon United and the awarding of damages to MP&L for curtailments necessitated by such shortage are barred or limited by:

(a) Article XVI of the contract between United and MP&L entitled "Use of Substitute Fuel";

(b) Article XVIII of the contract between United and MP&L subjecting such contract "to all present or future valid rules, regulations or orders of any commission or regulatory body having jurisdiction";

(c) Article IX of the contract between United and MP&L entitled "Impairment of Deliveries";

(d) Article VIII of the contract between United and MP&L dealing with "Force Majeure" or

(e) Any other provision of the contract between United and MP&L.

D. Issues Pertaining to the Compensation of MP&L by Higher Priority Customers.

1. Whether and to what extent MP&L may be compensated by higher priority customers on United's system for curtailments to MP&L resulting from the shortage on United's system?

2. Assuming some such compensation is forthcoming, to what extent will it or should it bar or limit the awarding of damages to MP&L for United's curtailments?

E. Questions Pertaining to the Impact of Curtailment Damages Upon United's Rendering of Service.

Whether the awarding of damages to MP&L for United's curtailments of deliveries resulting from the natural gas shortage on United's system:

(a) Would grant MP&L an undue preference or advantage in contravention of the Natural Gas Act;

(b) Would impair United's ability to continue rendering natural gas service on its system, or

(c) Would frustrate or hamper the Federal Power Commission's ability to allocate United's limited gas supplies fairly and in accordance with the public interest?

APPENDIX G

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT.

No. 86-4424.

UNITED GAS PIPE LINE CO.,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

Aug. 18, 1987.

Petition was filed for review of Federal Power Commission order. The Court of Appeals, 503 F.2d 844, vacated and remanded. On remand, the Commission approved tariffs, stating that pipeline company was not liable for contract damages arising from deliveries of natural gas curtailed in compliance with filed curtailment plan unless company, through negligence, bad faith, fault or willful misconduct, caused need for curtailments. Pipeline company sought review and six direct sales customers and a state public regulatory body sought to intervene. The Court of Appeals, Patrick E. Higginbotham, Circuit Judge, held that: (1) Commission had jurisdiction to approve exculpatory tariff applicable to direct sales customers; (2) pipeline company was liable for curtailed deliveries only if it caused need for curtailments through negligence, bad faith, fault or willful misconduct; (3) exculpatory provision of 1952 tariff applied to direct sales customers only following approval of revised tariff; and (4) intervenors could not raise

issues in addition to those raised by parties filing petitions for review.

Vacated in part and affirmed in part.

Peter J. Levin, Pierson, Semmes & Finley, W. DeVier Pierson, Washington, D.C., George Frazier, C. Murphy Moss, Jr., New Orleans, La., John R. Hutcherson, Brunini, Grantham, Gower & Hewes, Jackson, Miss., for United Gas Pipe Line Co.

Joel M. Cockrell, Jerome M. Feit, Sol. F.E.R.C., Washington, D.C., for F.E.R.C.

James R. Lacey, Gen. Sol., Newark, N.J., for Public Service Elec. & Gas Co.

Clayton L. Orn, Houston, Tex., Joseph P. Wise, Jackson, Miss., for New Orleans Public Service Inc. and Mississippi Power & Light Co.

Wayne J. Lee, Michael R. Fontham, New Orleans, La., for Louisiana Public Service Comn.

Margaret Fabic, Brooklyn, N.Y., Alvin Adelman, for Brooklyn Union Gas Co. and Elizabethtown Gas Co.

Andrew P. Carter, New Orleans, La., Terrence O'Brien, for Louisiana Power & Light Co.

Stephen M. Hackerman, Houston, Tex., for Pennzoil Co.

John F. Harrington, Washington, D.C., for Texas Gas Transmission Corp.

Constance Charles Willems, New Orleans, La., Ellis Baker Murov, for City of New Orleans.

Donna J. Bailey, Birmingham, Ala., for Southern Natural Gas Co.

Petition for Review of an Order of the Federal Energy Regulatory Commission.

Before THORNBERRY,
HIGGINBOTHAM, and DAVIS, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Once again we review a facet of the administrative proceedings, begun sixteen years ago before the Federal Power Commission, involving United Gas Pipe Line Company's curtailment of natural gas to its customers during the nation-wide natural gas shortages of the 1970's. We review Opinions Nos. 237 and 237-A, in which the Federal Energy Regulatory Commission approved tariffs stating that United is not liable for contract damages arising from deliveries of natural gas curtailed in compliance with a filed curtailment plan unless United, through negligence, bad faith, fault, or willful misconduct, caused the need for curtailments. United seeks greater protection from liability by a standard greater than negligence and would also have us require the Commission to determine whether United in fact was culpable. Several intervenors challenge the Commission's jurisdiction to approve the tariffs for direct sales customers and challenge whether the tariffs are in the public interest. We vacate the portion of the Commission's orders determining that force majeure did not apply on the facts, then conclude that the remainder of the decisions are reasonable exercises of Commission power and are supported by substantial evidence, and affirm.

I. HISTORY

The petitioner, United Gas Pipe Line Co., is among the largest of the nation's interstate natural gas pipeline companies that sell natural gas in direct sales and in sales for resale. United owns and operates a pipeline system that extends throughout Texas, Louisiana, Mississippi, Alabama and Florida. Its major pipeline customers distribute natural gas throughout the eastern half of the United States. United also sells gas to industries, power plants, and local distribution systems.

Six intervenors, New Orleans Public Services, Inc., Mississippi Power & Light Co., City of New Orleans, Louisiana Power & Light Co., Brooklyn Union Gas Co., and Elizabethtown Gas Co., are direct sales customers of United. The seventh intervenor, the Louisiana Public Service Commission, is a state public regulatory body with statutory authority to regulate public utilities in Louisiana and to assert the interests of Louisiana's consumers of electricity.

In 1952, during temporary natural gas shortages caused by the Korean War, the Federal Power Commission approved United's tariff section 12.1, which stated, "In the event a shortage of gas renders Seller unable to supply the full gas requirements of all of its consumers, then, Seller, may, without liability to Buyer prorate its gas supply in the manner hereinafter set forth. . . ."

Around 1970, the nation experienced severe shortages of natural gas. United lacked sufficient supplies to meet its customers' needs for the winter of 1970-71 and proposed to curtail deliveries according to the priorities in its 1952 tariff. On October 26, 1970, United sought an order from the FPC declaring that United's curtailment plan complied with its tariffs and that, given section 12.1, United incurred no liability for curtailments to any customer, including direct sales customers. *See United Gas Pipe Line Co.*, FPC Docket No. RP71-29. After two days of hearings on the order, United reached an agreement with its customers, except Monsanto Co., permitting curtailments through March 31, 1971.[1]

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[1] Monsanto petitioned for review of the agreement to the District of Columbia Circuit. It also sued United in the District Court for the District of Columbia, seeking damages for breach of contract and also injunctive relief. *See Monsanto Co. v. FPC,* 463 F.2d 799, 803 (D.C. Cir.1972). The D.C. Circuit dismissed Monsanto's petition to review, but held that the district court had jurisdiction over the contract action. *Id.* at 805, 808.

In February 1971, United made a supplemental filing for a curtailment plan through October 31, 1971. In March, Louisiana Power & Light Co. sued United, alleging that the curtailment breached its contract with United and challenging FPC jurisdiction to curtail gas to direct sales customers. The district court dismissed the suit, holding that the FPC had jurisdiction of both curtailment and certification proceedings for direct sales and that Louisiana Power & Light Co. had to exhaust its administrative remedies in both. *Louisiana Power & Light Co. v. United Gas Pipe Line Co.,* 332 F.Supp. 692, 698 (W.D. La.1971). We reversed, holding that the FPC lacked authority to curtail gas to direct sales customers. *Louisiana Power & Light Co. v. United Gas Pipe Line Co.,* 456 F.2d 326, 333-38 (5th Cir.1972). The Supreme Court in turn reversed, holding that the FPC under its power to regulate transportation can order curtailment plans involving both direct sales and sales for resale. *FPC v. Louisiana Power & Light Co.,* 406 U.S. 621, 647, 92 S.Ct. 1827, 1842, 32 L.Ed.2d 369 (1972).

With the winter of 1970-71, other pipelines experienced shortages. Responding to a growing fuel crisis, the FPC on April 15, 1971, by Order No. 431, required all interstate pipelines either to file new tariffs containing end-use curtailment[2] plans or to establish that existing curtailment tariffs conformed to FPC policy. The FPC asserted that the tariffs would control over inconsistent provisions in all sales contracts, jurisdictional and nonjurisdictional. Order No. 431, 18 C.F.R. § 270 (1971).

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[2] In end-use curtailment, the Commission determines that certain uses of gas (e.g., use by residential customers) have a higher priority than other uses (e.g., use as boiler fuel or industrial uses). In a shortage, customers purchasing gas for inferior uses will have gas deliveries curtailed before any service to higher-priority customers is curtailed. *See American Smelting & Refining Co. v. FPC,* 494 F.2d 925, 935 (D.C. Cir.1974).

On May 17, 1971, in response to Order No. 431, United proposed a five-category, end-use curtailment plan to replace the plan it already had. Second, United proposed to modify tariff section 12.1 to make clear that it could curtail both direct sales and sales for resale without liability. United also proposed a new tariff section 12.3 intended to eliminate United's potential liability under a substitute fuels provision[3] in some of its direct sales contracts.[4] Finally, United requested the FPC to construe narrowly the substitute fuel clauses.

In Opinion No. 606, 46 FPC 786 (1971), the FPC granted interim approval to proposed section 12.1 with one change in its curtailment priorities, effective November 14, 1971. A Hearing Examiner was ordered to assess the justness and reasonableness of the curtailment scheme before final

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[3] One substitute fuels provision reads:

> If so requested by Seller at any time and from time to time, Buyer agrees that it will use Number 2 grade fuel oil purchased and supplied by Buyer, as above set forth, in lieu of gas for Buyer's fuel requirements hereunder during the period or periods of time so requested by Seller. In the event Seller is excused by reason of force majeure or proration of impaired deliveries from delivering gas to Buyer for Buyer's fuel requirements hereunder, up to the Maximum Daily Delivery Obligation then in effect, and Buyer uses Number 2 grade fuel oil for its fuel requirements, even though not so requested to do by Seller, during the period Seller is so excused from delivering gas hereunder, all such fuel oil so used by Buyer during any period of not more than seven consecutive days shall be deemed to have been used by Buyer at Seller's request.

Exhibit 23, Gas Sales Agreement Between Mississippi Power & Light Co. and United Gas Pipe Line Co., art. XVI (July 31, 1965).

[4] The proposed tariff section 12.3 stated, "[N]or shall seller be obligated to pay or credit such customers any sums with respect to substitute fuels burned by such customers during such a period of proration or interruption."

approval. The FPC rejected proposed tariff 12.3 and declined to interpret the substitute fuel clauses, reasoning those actions were unnecessary because "[i]mplementation of the curtailment plan itself, pursuant to our procedures, would be an absolute defense for United against all claims for specific performance, damages, or other requests for relief . . . that may be initiated in the courts." 46 FPC at 805. United's customers objected to this language and sought rehearing.

The FPC denied rehearing in Opinion No. 606-A, 46 FPC 1290 (1971), explaining, "[T]he pipeline companies cannot be faced with the dilemma of providing nondiscriminatory service as ordered by the Commission and at the same time incur liability for breach of contracts which grant discriminatory preferences, directly or indirectly." *Id.* at 1293.

In *International Paper Co. v. FPC,* 476 F.2d 121 (5th Cir.1973), we reviewed Opinions Nos. 606 and 606-A and rejected the FPC's conclusion that implementation of a curtailment plan is an absolute defense against contract claims, saying the conclusion was "mere dicta and has no force other than to reflect a position taken by the FPC which lacks support in the record before it." *Id.* at 125. We also suggested "that a court which has the actual damage suit before it, and also the final FPC action, is best suited to determine the applicability of a defense recognized in contract law." *Id.* at 126 (footnote omitted). We then remanded for the FPC to state clearly its justification for its rule and to develop the necessary record to provide meaningful review. *Id.* at 129.

In a concurring opinion that greatly influenced the Commission's later rulings, Judge Brown observed that a pipeline's immunity from liability for curtailments in compliance with a federal plan is not based solely on the defense of impossibility because of an intervening government order, but is based on federal preemption. *Id.* at 131. Judge

Brown suggested that a pipeline should not be liable for its compliance with a federal curtailment plan, for such liability "would seriously impair the orderly administration of the regulatory scheme." *Id.* However, were the customers to establish that the need for curtailment was "precipitated by the pipeline's own failure to heed the signs of an impending crisis," then the analysis *"might"* be different enough to warrant imposing liability on the pipeline. *Id.* at 131-32.

Opinions Nos. 647 and 647-A

In July 1972, the Presiding Examiner made findings on the justness and reasonableness of United's curtailment plan, as Opinion No. 606 directed. In January 1973, before *International Paper Co.,* the FPC reviewed the Presiding Examiner's decision, approved some interim and permanent changes in the curtailment priorities in section 12.1, restated its view that United could not be liable for curtailments complying with a federal plan, and ordered United to delete section 12.3 as unnecessary. Opinion No. 647, 49 FPC 179, 193 (1973).

After the decision in *International Paper Co.,* the FPC reheard Opinion No. 647 and attempted to clarify its views in accordance with our recent decision. Opinion No. 647-A, 49 FPC 1211 (1973). The FPC determined that a pipeline curtailing gas in compliance with a filed curtailment plan must be exonerated from liability unless it caused the shortages through negligence, bad faith, or other wrongful conduct. The FPC agreed that it could not adjudicate contract liability, but affirmed its finding in Opinion No. 647 that United was not guilty of improvidence or willful misconduct. 49 FPC at 1220-21. The FPC held the substitute fuel clauses were not against the public interest, but expressly conditioned that holding on its interpretation that the clauses imposed liability on United for seven days only. *Id.* at 1221-22. Finally, the FPC determined that proposed section 12.3 was unnecessary. *Id.* at 1224.

In *Louisiana v. FPC,* 503 F.2d 844 (5th Cir.1974), we reviewed Opinions Nos. 647 and 647-A and again vacated and remanded the FPC's conclusions about contract liability and related tariff issues. We noted that the FPC rejected proposed section 12.3 because it determined that United was not exposed to contract liability for curtailments unless United was negligent or otherwise culpable, that United was not improvident in fact and therefore was not liable, and that the substitute fuel clauses in any event imposed liability for only seven days. We held that the proper questions were whether the proposed provision could remove general contract liability and whether the removal of liability subjected United's customers to "any undue prejudice or disadvantage." *Id.* at 867. We concluded that, because "the Commission cannot adjudicate contract liability, it should evaluate section 12.3 on the assumption that United faces possible liability—not on the assumption it is immune." *Id.* at 867-68. We also held the FPC's interpretation limiting to seven days United's liability under the substitute fuel clauses to be "without force and effect" for lack of adequate supporting reasons. *Id.* at 868.

Opinions Nos. 237 and 237-A

On remand from *Louisiana v. FPC,* the FPC on March 7, 1975, created "Phase I" of United's curtailment proceedings to establish an interim curtailment plan, while "Phase II" developed a permanent curtailment plan and considered the issues relating to United's liability and to the proposed tariff sections. Meanwhile, United resubmitted to the FPC proposed section 12.3.[5] On May 2, 1975, the FPC severed the liability issues from Phase II and created "Phase III" to examine United's liability under curtailment plans on an expedited basis. 53 FPC 1496,

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[5] Redesignated in the application as section 12.4. We will continue to refer to the provision as section 12.3 to avoid confusion.

1500 (1975). Only Phase III is involved in this petition for review. On August 20, 1975, the FPC enlarged Phase III to consider whether section 12.1 of United's tariff precludes damage claims.[6] 54 FPC 796, 799 (1975).

On August 30, 1974, Mississippi Power & Light Co. sued United and Pennzoil, United's former parent, for breach-of-contract damages totaling $160,000,000.00. The district court stayed the suit pending the FPC's exercise of primary jurisdiction. We affirmed, indicating five components of the suit in which the FPC's assistance could be significant, including determination of the facts and circumstances that caused the shortage. *Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 532 F.2d 412, 420 (5th Cir.1976).[7]

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[6] Meanwhile, Mississippi Public Service Commission petitioned the FPC for extraordinary relief on behalf of Mississippi Power & Light Co. and other Mississippi utilities, seeking compensation from the customers receiving a higher preference in United's curtailment plan in order to allocate the financial burden of curtailment among all customers. The Commission denied the petition for lack of jurisdiction to order compensation. We reversed and remanded for the Commission to consider the proposal. *See Mississippi Public Service Comm'n v. FPC*, 522 F.2d 1345, 1350-51 (5th Cir.1975), *cert. denied*, 429 U.S. 870, 97 S.Ct. 181, 50 L.Ed.2d 149 (1976).

[7] Between 1971 and 1975, several of United's direct sales customers brought suit against United in various state and federal courts, seeking to recover damages amounting to $1,973,820,622.00, which they claimed to suffer as a result of United's curtailments. United settled with Gulf States Utilities Co., which claimed over $700 million in damages, for $112 million. On August 24, 1984, the City of New Orleans and New Orleans Public Service, Inc., obtained judgment in state court against United for $44,403,106.00, and Louisiana Power & Light Co. obtained judgment for $40,309,142.00. *See City of New Orleans v. United Gas Pipe Line Co.*, Nos. 575-544, 579-040 (Civ.D.Ct.Parish of Orleans, La. Aug. 24, 1984). The Louisiana Court of Appeals recently affirmed both judgments, increasing the recovery of the City of New Orleans and NOPSI to $46,410,925.00 and increasing the recovery of Louisiana Power & Light Co. to $90,014,543.00. *See City of New Orleans v. United Gas Pipe Line Co.*, Nos. 3613-3614 (La.Ct.App. Apr. 30, 1987).

On August 9, 1978, the Federal Energy Regulatory Commission[8] issued an order identifying seven issues to comprise the scope of Phase III:

1. Is it within the Commission's jurisdiction and authority under the Natural Gas Act to approve proposed section 12.3 as a part of United curtailment tariff?

2. If the answer to question 1 is "yes," should Section 12.3 be approved?

3. If so, what should be the effective date of such provision?

4. What would be the effect of Section 12.3 upon United's potential contract liability? Specifically, would approval of Section 12.3 effectively abrogate the substitute fuel clauses contained in the contract between United and certain of its customers?

5. If so, would this serve to grant any undue preference or advantage to any person or subject any person to undue prejudice or disadvantage within the meaning of section 4(b)(1) of the Natural Gas Act?

6. Do any other of United's tariff provisions or any general or specific orders of the Commission remove or limit United's potential contract liability?

7. Would the awarding of damages for United's curtailments grant the recipients thereof an undue preference or advantage in contravention of the Natural Gas Act?

4 FERC ¶61,151, at 61,355 (1978). No party sought rehearing or clarification of this order.

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[8] On August 4, 1977, Congress enacted the Department of Energy Organization Act, Pub.L. No. 95-91, 91 Stat. 565 (1977), which created the Federal Energy Regulatory Commission and transferred to it the functions of the Federal Power Commission. *See* 42 U.S. §§ 7171-7122.

On September 14, 1982, after extensive evidentiary hearings, the Administrative Law Judge issued his Initial Decision on Phase III, 20 FERC ¶ 63,070 (1982), which the Commission for the most part affirmed on June 19, 1985, in Opinion No. 237, 31 FERC ¶ 61,336 (1985). In Opinion No. 237, the Commission affirmed the ALJ's decision not to determine whether United improvidently or negligently caused the shortage of gas, for that determination was beyond the scope of Phase III and would be conclusively determined by the courts anyway.[9]

Addressing the questions in Phase III, the Commission determined that it had authority to approve tariffs exculpating United from contract liability for curtailments to both direct sales and resale customers, provided that United did not cause the shortages through negligence or willful misconduct and that United effected the curtailments in accordance with filed curtailment plans. The Commission ordered United to refile sections 12.1 and 12.3 with modifications to reflect the Commission's standard for exculpation, and made the sections effective November 14, 1971.

The Commission held that the modified section 12.3 would remove United's liability during curtailments under the substitute fuel clauses unless United caused the shortage through negligence or willful misconduct. If United were liable, the Commission interpreted the substitute fuel clauses to mean that United would be liable only for seven days of substitute fuel costs.

The Commission further determined that no undue preference would be granted and no undue prejudice imposed by adoption of sections 12.1 and 12.3 as modified effective November 14, 1971. The Commission also held that no

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[9] Although the ALJ made findings about the facts and circumstances surrounding curtailment when analyzing whether United's proposed tariffs must be rejected because of United's "unclean hands," the Commission did not adopt the ALJ's statements as its findings.

other tariff provisions removed or limited United's potential contract liability, specifically saying the force majeure provisions in tariff sections 11.1 and 11.2 did not apply because the shortage was not completely out of United's control: United controlled aspects of its supply and demand.

Finally, the Commission repeated its position that, even in the absence of the exculpatory clauses, damages cannot be awarded for failure to deliver without a showing of fault, for the award is preempted by the federal curtailment scheme. The Commission denied rehearing in Opinion No. 237-A, 35 FERC ¶ 61,344 (1986).

On June 17, 1986, United filed in our court a petition for review of Opinions Nos. 237 and 237-A. No other party or intervenor below filed a petition for review. However, within sixty days of Opinion 237-A and within thirty days of United's petition, the intervenors filed notices of intervention.[10] Later, some intervenors filed Docketing Statements raising several issues not in United's petition for review and Docketing Statement. The Commission moved to dismiss the intervenors' additional issues for want of jurisdiction: the intervenors had not filed petitions for review within the sixty-day period and therefore were limited to those issues United raised. United moved to strike the portions of the intervenors' briefs dealing with the additional issues. We have carried the motions with this case.[11]

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[10] Public Service Electric & Gas Co., Pennzoil Co., and Texas Gas Transmission Co. also filed timely notices of intervention, and Southern Natural Gas Co. was granted leave to intervene out of time. None filed briefs and none is included in the term "intervenors" in the text.

[11] United, in its Brief in Partial Support of Respondent, also moves that portions of the briefs of City of New Orleans and the Louisiana Public Service Commission be stricken or ignored for failing to provide page references to the record for factual assertions, as Fed.R. App.P. 28 requires.

On February 7, 1987, Brooklyn Union Gas Co. and Elizabethtown Gas Co. moved for leave to file a joint reply brief. The Commission and United opposed the motion because the two intervenors did not petition for rehearing of Order No. 237 and thus do not meet the jurisdictional requirements for review. The motion has been carried with the case.

II. FERC JURISDICTION

We first decide whether the Commission has jurisdiction to approve an exculpatory tariff applicable to direct sales customers. The Natural Gas Act, § 1(b), 15 U.S.C. § 717(b), provides:

> The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

In *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 92 S.Ct. 1827, 32 L.Ed.2d 369 (1972), the Supreme Court interpreted this statute to grant the FPC transportation authority over direct sales while withholding only rate-setting authority. *Id.* at 638, 92 S.Ct. at 1837. The Court stated that "[c]urtailment regulations are not *rate-setting* regulations but regulations of the 'transportation' of natural gas and thus within FPC jurisdiction." *Id.* The Supreme Court further observed that Congress, in section

16 of the Natural Gas Act,[12] intended a generous construction of the Commission's statutory authority to deal with its jurisdictional responsibilities. *Id.* at 642, 92 S.Ct. at 1839.

The dispositive jurisdictional question, then, is whether the exculpatory tariffs are rate-setting regulations that may not be applied to direct sales customers, or whether the tariffs are transportation regulations that may be applied to direct sales customers. In *Louisiana v. FPC,* 503 F.2d 844, 867 (5th Cir.1974), we resolved that question by explaining that "the proposed exculpatory provision [section 12.3] was part and parcel of United's proposed curtailment plan."[13] Because exculpatory clauses are "an integral part of a proposed curtailment plan," *id.*, because curtailment plans are within the Commission's transportation jurisdiction, and because the Commission has jurisdiction over direct sales in regulating transportation, it must follow that the Commission has jurisdiction to approve exculpatory clauses for curtailments to direct sales customers. *See Mississippi Public Service Commission v. FPC,* 522 F.2d 1345, 1350 (5th Cir.1975), *cert. denied,* 429 U.S. 870, 97 S.Ct. 181, 50 L.Ed.2d 149 (1976) (a proposed plan for high priority users to compensate low priority users during curtailment is part of a curtailment plan within the Commission's transportation jurisdiction).

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[12] Section 16 provides:

> The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act. . . .

15 U.S.C. § 717o.

[13] Our discussion of the federal interest later in this opinion explains why exculpatory clauses are necessary and integral to curtailment plans.

III. UNITED'S OBJECTIONS

United, recognizing that the Commission's decision leaves it exposed to liability for curtailments, seeks greater protection from liability in its petition for review.[14] Allegedly concerned about the multiplicity of judicial standards to determine fault, United argues that the Commission should have formulated a uniform federal standard to determine United's fault in causing the shortages and argues that the uniform standard should be bad faith or willful misconduct, not negligence. United would also require the Commission to determine whether United negligently caused the shortages. To avoid liability for curtailments to direct sale customers for the 1970-71 winter heating season, United asserts that the exculpation provision of section 12.1 applied to direct sales since 1952 instead of only since November 14, 1971. Finally, United asserts that the Commission lacked substantial evidence and reasoned analysis in determining that no other tariff provisions—specifically, the force majeure clause—remove or limit United's potential contract liability for curtailments.

We note that "the Commission enjoys substantial discretion in balancing the competing interests involved in natural gas pipeline regulation." *Mississippi River Transmission Corp. v. FERC,* 759 F.2d 945, 952 (D.C.Cir.1985). Thus, "[j]udicial scrutiny under the Natural Gas Act is limited to assuring that the Commission's decisionmaking is reasoned, principled, and based upon the record." *Columbia Gas Transmission Corp. v. FERC,* 628 F.2d 578, 593 (D.C.Cir.1979). "The Commission's findings of fact are conclusive if supported by substantial evidence." *Tennessee Gas Pipeline Co. v. FERC,* 809 F.2d 1138, 1143 (5th Cir.1987). Substantial evidence is "such relevant evidence

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[14] United does not challenge the Commission's determination that United is not liable for curtailed deliveries when United did not negligently cause the shortage.

as a reasonable mind might accept as adequate to support a conclusion." *Consolo v. Federal Maritime Commission,* 383 U.S. 607, 620, 86 S.Ct. 1018, 1026, 16 L.Ed.2d 131 (1966).

A. Uniform Federal Standard

United argues that the Commission should have articulated a uniform federal standard of culpability because the lack of a uniform standard creates undue preferences for the customers obtaining damages under state standards that are more lenient than those applied to other customers in other states. United notes that the requirement of culpability to recover for curtailment damages is a federal overlay on state contract law; no common law rules of culpability exist for this complex setting. United would have the Commission allow damages only when a customer proves United's bad faith or willful misconduct, although United would accept a negligence standard if the Commission itself adjudicates whether United was negligent.

United, then, fears application by courts and juries of Commission standards. While United's argument is expressed as a quest for a uniform federal standard to avoid undue prejudice or preference to anyone, its objective is plainly a uniform requirement of greater culpability to avoid judgments against it. United's arguments are not persuasive.

1. The Need for a Uniform Standard

To determine whether the Commission should have stated a uniform federal standard of culpability, we find it useful—but not mandatory—to draw upon the test for applying federal common law in place of state law: the comprehensiveness of the federal regulation, the federal interest in the regulated subject matter, and the need for uniform results. *Pennzoil Co. v. FERC,* 645 F.2d 360, 385 (5th Cir.1981) (footnote omitted), *cert. denied,* 454 U.S. 1142, 102 S.Ct. 1000, 71 L.Ed.2d 293 (1982). First, the federal regulations are not comprehensive. Although the

Natural Gas Act and the Natural Gas Policy Act regulate much of the natural gas industry, "the federal scheme of regulation . . . is limited in its displacement of state regulatory authority." *Id.*

Second, the federal interest is to protect the federal curtailment scheme. Hence, the Commission determined that the public interest required the abrogation of contract liability based solely on compliance with a filed curtailment plan, but did not require exculpation when a pipeline causes the shortage by negligence or wrongful misconduct. That is, the Commission determined that the public interest required exculpation only when the basis for contract liability directly conflicts with the federal curtailment plan, but no more. The Commission's determination of the public interest is rational and adequately supported by reasons and findings.

We start with the proposition that the Commission may curtail deliveries of gas according to priorities it determines to be in the public interest, whether or not the priorities correspond to those created by contract. *See California v. Lo-Vaca Gathering Co.,* 379 U.S. 366, 369-70, 85 S.Ct. 486, 488, 13 L.Ed.2d 357 (1965) (pipelines cannot by contract avoid their public interest obligations once the Commission's jurisdiction attaches); *American Smelting & Refining Co. v. FPC,* 494 F.2d 925, 934 (D.C.Cir.), *cert. denied,* 419 U.S. 882, 95 S.Ct. 148, 42 L.Ed.2d 122 (1974). Clearly, then, the Commission's curtailment scheme preempts the customers' contract right to specific performance of deliveries; otherwise, the curtailment scheme would have no effect. *Cf. National Licorice Co. v. NLRB,* 309 U.S. 350, 365, 60 S.Ct. 569, 577, 84 L.Ed. 799 (1940). As the Commission determined, a federal curtailment plan would also be frustrated were a pipeline liable for damages caused solely by its compliance with the federal curtailment scheme. *See* Initial Decision, 20 FERC ¶ 63,070, at 65,304. A damage award, like an order for specific performance, enforces the abrogated contract right to deliv-

eries and creates incentives for the pipelines to resist a federal curtailment scheme. Consequently, curtailment plans may be reasonable without any compensation features. *See City of Willcox v. FPC,* 567 F.2d 394, 420 (D.C.Cir.1977), *cert. denied,* 434 U.S. 1012, 98 S.Ct. 724, 54 L.Ed.2d 755 (1978).

Furthermore, a damage award based on compliance with the federal curtailment scheme creates undue preferences for the customer receiving the award because the award directly, by being passed on through rate increases, or indirectly, through weakening the pipeline's financial condition, adversely affects the pipeline's other customers. *See* Opinion No. 237, 31 FERC ¶ 61,336, at 61,770. In essence, the award also nullifies the curtailment scheme for the party receiving damages while leaving it in force for others, creating unequal enforcement of the scheme. For similar reasons, we have determined that a utility may not be required both to comply with a validly-filed tariff and to pay money damages for the utility's compliance with the tariff alleged to violate the antitrust laws. *See Carter v. American Telephone & Telegraph Co.,* 365 F.2d 486, 495-96 (5th Cir.1966). Therefore, in the words of Judge Brown, we agree with the Commission that "[i]t would be unthinking to suggest that, having curtailed in compliance with the dictates of the FPC, . . . the Pipeline could thereafter be held accountable for its compliance." *International Paper Co.,* 476 F.2d at 131.

On the other hand, if compliance with a filed curtailment scheme in all cases protects a pipeline from liability, a pipeline could contract to deliver more gas than it knows it is able, relying on the federal curtailment scheme to immunize it. Thus, incentive for prudent management would be undermined. Consequently, it is not in the public interest to exculpate a pipeline from its own negligence or willful misconduct. *See Tennessee Gas Pipeline Co.,* 57 FPC 1593, 1600-01, 1603-04 (1977). We note that the Commission's determination of when exculpation serves the

public interest comports with the reasoning of Judge Brown in *International Paper Co.,* 476 F.2d at 131-32, and of the D.C. Circuit in *Monsanto Co. v. FPC,* 463 F.2d 799, 808 (D.C.Cir.1972). Also, the Commission's determination accomodates the public interest in contract enforcement by narrowly limiting exculpation to that necessary to the integrity of curtailment plans.

Third, uniformity of result is needed only to protect the federal interest, that is, only to exculpate United from contract liability in all cases not based on United's fault. Uniformity of exculpation beyond those cases is not a matter of federal concern, for liability then does not create incentives for United to resist a federal curtailment scheme. Rather, liability flows only from United's mismanagement in causing the shortage of gas, creating incentives for United to manage properly its gas supply and demand. Thus, the Commission acted correctly in approving the tariffs if the tariffs will uniformly exculpate United from liability based solely on failure to deliver contract quantities of gas.

2. The Sufficiency of Uniformity

United's arguments that the Commission erred in not adopting such a uniform federal standard suffer from several flaws. Most important, the Commission *has* articulated a uniform federal standard of liability: United is liable for curtailed deliveries only if it caused the need for curtailments through "negligence, bad faith, fault, or willful misconduct." This standard uniformly means that a customer must establish United's negligence or greater misconduct in causing a foreseeable shortage in order to recover damages. Although United has expressed concern that courts may read "fault" to mean a level of culpability less than negligence (such as strict liability or breach of a good faith duty), we note that "fault" is generally considered "the equivalent of negligence," *see Continental Insurance Co. v. Sabine Towing Co.,* 117 F.2d 694, 697 (5th Cir.1941),

and that such definition of "fault" is the only definition consistent with the Commission's statements that a customer may recover only for United's negligence or willful misconduct. *See, e.g.,* Opinion No. 237-A, 35 FERC ¶ 61,344, at 61,791; Initial Decision, 20 FERC ¶ 63,070, at 65,304-05. Any standard of fault less than negligence is preempted by the federal standard in this setting.

United suggests that the Commission's standard is not uniform because it draws on state law as applied by juries and courts rather than by the Commission itself. Because no state common-law rules exist to define the culpability needed for contract liability once a strict breach-of-contract standard is displaced, United argues that states will pick and choose among several possible standards, some imposing liability for negligence, others for bad faith. Consequently, customers suing in one state may recover while a customer suing under another state's laws on the same facts will not.

We are not persuaded that the states' limited ability to choose among various standards of culpability undermines the federal interest in enforcing its curtailment priorities. Were a state to apply a standard of culpability less than negligence, that standard would directly conflict with the Commission's jurisdictional determination of the public interest and would be void under the supremacy clause, U.S. Const. art. VI, cl. 2. As we have already stated, only uniformity in that area is necessary to the curtailment scheme. In the unlikely event a state requires a standard of culpability higher than negligence, that choice does not implicate the federal interest. Rather, the risk of liability in those cases comes from United's culpable causation of the shortage, not from compliance with the federal curtailment scheme. Any variations in state law that are not preempted thus do not create undue preferences of federal concern.[15]

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[15] United points to the state court judgment in *City of New Orleans*

United also suggests the Commission's standard lacks uniformity and creates undue preferences because state definitions of negligence vary. Thus, United requests the Commission to define what constitutes negligence for a pipeline operating under federal regulations. We note that negligence is generally defined as the failure to exercise reasonable care, that is, the degree of care which a person of ordinary prudence would exercise in the same or similar circumstances. *See, e.g, Pampas v. Cambridge Mutual Fire Insurance Co.*, 169 So.2d 200, 201 (La.App.1964). United has not persuaded us that the several states deviate so much from this definition as to undermine the exculpation necessary to protect the federal curtailment priorities. Any variation in result that does not undermine the federal curtailment plan is not of federal concern, and therefore creates no *undue* preference.

Admittedly, the term "negligence" is plastic in the hands of some courts, but the federal interest is implicated only when a proffered label of negligence or other label assertedly fault-based in fact imposes liability for curtailed deliveries when curtailment was not reasonably foreseeable and avoidable. The point is that, whether addressed as an issue of causation or liability, states are not free to attach consequences to curtailed deliveries that United with reasonable efforts could not have foreseen and avoided. A state's use of the labels "negligence" or "fault" thus does not necessarily satisfy the federal standard.

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v. United Gas Pipe Line Co., Nos. 575-544, 579-040 (Civ.D.Ct.Parish of Orleans, La. Aug. 24, 1984), *aff'd as modified*, Nos. 3613-3614 (La. Ct.App. Apr. 30, 1987), as an example of a state court picking its own standard of culpability, one allegedly less than negligence. While we recognize that United may have legitimate concerns about the state court's treatment of federal preemption, burden of proof, and breach of good faith duty to provide gas "whatever the cost," we have no basis for concluding other than that the Louisiana Supreme Court will enforce the federal standard and we express no opinion about the case.

We pause to emphasize this point because we are well aware that liability in contract and liability in tort are kindred spirits and blend together at their edges. For example, defining the pipeline's duty of care as derived from the contract obligations and defining the breach of the duty as negligent failure to perform is indistinguishable from the preempted contract standard in two entangled ways. First, of course, is the definition's failure to require proof that the lack of performance did not satisfy a standard of objective reasonableness. Second, liability under the improper definition does not rest on a showing that the objectively unreasonable acts proximately caused nondelivery.

Our use of *proximate* rather than producing cause is intentional to highlight the element of foreseeability inherent in the federal standard. If the need for curtailment was not reasonably foreseeable, imposition of liability for curtailments does little to encourage prudent management. However, it does a great deal to encourage the curtailing pipeline not to curtail to its firm customers, thus undermining end-use curtailment. Therefore, proof of foreseeability is a necessary element of the Commission's standard.

We also note that the federal standard imposes on customers claiming damages the burden to prove United's negligence or wrongful misconduct in causing the shortages. *See International Paper Co.*, 476 F.2d at 131-32 (Brown, J., concurring) ("[I]f *a customer* could prove this element of 'bad faith' on the part of the pipeline," liability "might" be proper (emphasis added).). A contrary rule, one placing on United the burden to prove its lack of negligence or willful misconduct, would undermine the federal interest. The contrary rule permits customers to rely on a presumption of United's liability based solely on United's failure to deliver the contract quantities of gas. That the customers' prima facie case and possible judgment may rest on this rebuttable presumption is inconsistent with the Commission's determination that liability

may not rest solely on failure to deliver contract quantities of gas.[16]

Finally, United suggests that undue preferences are created by the Commission's decision to permit juries and courts to determine what constitutes negligence. In other words, United argues that uniformity in the negligence rule does not mean uniformity of result. Wary of the courts' ability to adjudicate negligence in complex fact settings, United would have liability rest on bad faith in order to ensure uniform results.

United's argument forgets that the risk of varying results in a fault-based inquiry comes from the Commission's displacing the risk allocated in United's contracts. While the displacement of contract risk is necessary to enforce the federal curtailment scheme, the displacement of fault-based liability is not. Indeed, results may not be uniform. But that lack of uniformity affects only United's incentives to manage prudently its supply and contract obligations. It does not affect the incentives to comply with the federal curtailment scheme. We also note the same potential for lack of uniformity exists under any standard, including the bad faith standard United would have the courts apply. Whatever variations may exist in applying the state negligence standard in accordance with this opinion, they are not undue. Furthermore, to the extent United is concerned that some of its actions taken under Commission supervision and determined to be in the public interest may become the basis of liability when evaluated by a court or jury, United is already protected under case law. *See Chicago & Northwestern Transportation Co. v. Kalo Brick &*

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[16] Certainly, United has the burden of establishing the defense of impossibility of performance because of an intervening government order. Nevertheless, the standard of exoneration in the tariffs is not a defense, but is a federal standard of liability that preempts inconsistent state law standards. *See International Paper Co.*, 476 F.2d at 131 (Brown, J., concurring).

Tile Co., 450 U.S. 311, 101 S.Ct. 1124, 67 L.Ed.2d 258 (1981) (state's determination of reasonable service requirements that conflict with federal agency's determination of reasonable service requirements is invalid). Having already limited state contract law by exculpating United from strict breach-of-contract suits during curtailments, the Commission was correct to leave adjudication of negligence to the courts.

In sum, "[n]ot all parties injured as a result of the necessity to react quickly to the natural gas crisis can be made whole." *Hercules, Inc. v. FPC,* 552 F.2d 74, 89 (3d Cir.1977). As the D.C. Circuit stated:

> The difficult problem of balancing competing equities and interests has been given by Congress to the Commission with full knowledge that this judgment requires a great deal of discretion Accordingly, it is not the role of the courts to second guess the Commission's judgment because we think we could devise a better solution than that which the agency has adopted so long as the agency's determination has a rational basis. *Gulf Oil Corp. v. FPC,* 563 F.2d 588, 608 (3d Cir. 1977). We find such a rational basis in the orders presently under review.

Arizona Electric Power Cooperative, Inc. v. FERC, 631 F.2d 809, 802 (D.C.Cir.1980).

B. Agency Determination of Culpability

United argues that the Commission's refusal to make findings about United's culpability in causing the shortage was arbitrary and capricious. We disagree.

United is procedurally barred from challenging the scope of Phase III in this appeal. On August 9, 1978, the Commission issued an order expressly defining the seven issues comprising the scope of Phase III.[17] None includes the

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[17] The seven issues are seth forth in Part I of this opinion.

determination of United's culpability or the circumstances surrounding the shortages. Rather, the order specifically rejected a request to determine those facts because "such questions pertain primarily to the issue of United's possible contract liability to its customers for curtailment damages rather than to issues related to the establishment of United's curtailment plan." 4 FERC ¶ 61,151, at 61,350. Evidence relating to United's culpability or to the circumstances of the shortage was admitted only as it related to the justness and reasonableness of the tariffs. *Id.* at 61,356. United's challenge to the scope of Phase III should have been raised in a request for rehearing and clarification of the August 9, 1978, order. No one sought rehearing of the order. Therefore, United's argument may not now be raised. *See Placid Oil Co. v. FERC,* 666 F.2d 976, 980 (5th Cir.1982). In any event, the argument is without merit.

The Commission has provided valid reasons for not determining United's liability. First, the determination of United's culpability is not inevitably relevant to the Commission's regulation of curtailment: the Commission orders curtailment schemes regardless of the culpability of the curtailing pipeline. Thus, the Commission can reasonably conclude that it is not authorized to determine the facts of the shortages. Expertise in an area is not tantamount to statutory authority to act in all aspects of that area.

Second, contrary to United's assertions, our cases indicate that the Commission need not determine these facts. In *Louisiana v. FPC,* 503 F.2d 844, 867 (5th Cir.1974), we repeated our position in *International Paper Co.,* 476 F.2d 121, 126 (5th Cir.1973), that "the Commission cannot adjudicate contract liability." The Commission correctly reads these opinions as denying it binding adjudicatory power over United's culpability and as requiring it to assume culpability in analyzing the effect of the proposed tariffs on United's liability.

The result is not changed by *Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 532 F.2d 412 (5th Cir.1976), *cert. denied*, 429 U.S. 1094, 97 S.Ct. 1109, 51 L.Ed.2d 541 (1977), in which we upheld the stay of an action for breach of contract damages until the FPC exercised its primary jurisdiction to resolve various issues related to curtailment plans. We mentioned that "the Commission's informed opinion" on the facts and circumstances surrounding the shortage "will be of material aid to the district court in the resolution of the damage action." *Id.* at 420. This statement does not require the Commission to adjudicate culpability. Indeed, were the Commission to adjudicate United's liability, its adjudication of that essentially state common-law issue would seriously implicate article III, *see Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 105 S.Ct. 3325, 3334-35, 87 L.Ed.2d 409 (1985), and the parties' seventh amendment right to a jury trial, *see Curtis v. Loether*, 415 U.S. 189, 194-95, 94 S.Ct. 1005, 1008-09, 39 L.Ed.2d 260 (1974). Consequently, the Commission's findings would be, at best, advisory. Thus, the Commission did not arbitrarily and capriciously refuse to determine United's culpability or the facts surrounding the gas shortage.

C. Effective Date of Tariffs

United argues that the Commission erred in holding that the exculpatory provision of section 12.1 of the 1952 tariff applied to direct sales customers only since the revised section 12.1 received interim approval effective November 14, 1971.[18]

The exculpation clause in section 12.1 of the 1952 tariff authorized proration of gas during times of shortage "without liability to Buyer." While recognizing that the 1952

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[18] United does not challenge the approval of section 12.3 effective November 14, 1971, nor that section 12.1 as modified is effective since November 14, 1971.

tariff nowhere defines "Buyer," the ALJ determined that "Buyer" did not refer to direct sales customers. The ALJ's decision is supported by substantial evidence. First, the word "Buyer" is used throughout the tariff in other contexts that can apply only to resale customers and not direct sales customers. Second, United's contracts with direct sales customers made no reference to the tariff; some contained a separate "impairment of deliveries clause" that did not provide for exculpation during curtailments. Third, the Commission did not assert jurisdiction to order curtailments to direct sales customers until July of 1971, and the Supreme Court did not uphold that jurisdiction until 1972. It is unlikely that a tariff filed in 1952, long before the Commission asserted curtailment jurisdiction over direct sales, was intended to apply to direct sales.

The evidence to which United points does not change our conclusion. The ALJ was free to disregard the interested testimony of United's past president that the 1952 tariff applied to direct sales customers. Further, the fact that the tariff contained a system of curtailment priorities that included the direct sales customers does not establish that the exculpation clause applied to direct sales customers. In the curtailment priority provision, the direct sales customers are specifically identified by how they use the gas. Only the word "Buyer" identifies the entity against which the exculpation clause applies.

Nor do we consider the ALJ's interpretation of "Buyer" to conflict with a previous FPC order or with the Supreme Court's decision in *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 92 S.Ct. 1827, 32 L.Ed.2d 369 (1972). On July 2, 1971, the Commission ordered United to comply with the curtailment priorities in its tariff by preventing certain direct industrial customers from taking gas in excess of the volumes allocated them under the curtailment program United had filed with the Commission. *United Gas Pipe Line Co.*, 46 FPC 21 (1971). The order did not

hold that the exculpation clause in section 12.1 applied to direct sales customers. It held only that United was bound by its own tariffs and their curtailment priorities.

Louisiana Power & Light Co. is also inapposite. While the Supreme Court upheld the jurisdiction of the Commission to apply curtailment plans to direct sales customers under the 1952 tariff's priority scheme, and while it follows that the Commission has jurisdiction to exculpate United from liability to direct sales customers as part of the federal curtailment plan, it does not follow that the Commission *exercised* that jurisdiction in approving the 1952 tariff. The Commission first exercised its jurisdiction to approve exculpatory clauses applicable to direct sales customers when it gave interim approval to United's proposed section 12.1, which applied to all "customers" effective November 14, 1971.

D. Force Majeure

Finally, United argues that the Commission erred in determining that the force majeure clause in tariff section 11[19] did not limit United's potential contract liability.

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[19] Section 11 of United's tariff states:

11.1 *Definition of "Force Majeure"*—The term "force majeure" as employed herein shall means acts of God, strikes, lockouts or other industrial disturbances, acts of public enemy, wars, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts, arrests and restraints of governments and people, civil disturbances, explosions, breakage of accident to machinery or lines of pipe, the necessity for making tests, repairs or alterations to machinery or lines of pipe, freezing of wells or lines of pipe, partial or entire failure of wells, and any other causes, whether of the kind herein enumerated or otherwise, not within the control of the party claiming suspension and which by the exercise of due diligence such party is unable to prevent or overcome. . . .

11.2 *Limitations on Obligations*—In the event of either Buyer or Seller being rendered unable wholly or in part by force majeure to carry

The Commission offered three reasons that the force majeure clause does not limit United's liability for curtailments. First, the Commission determined that United's petition of October 26, 1970, did not satisfy the tariff's notice requirements. Section 11.2 required United to give "notice and full particulars of such force majeure in writing or by telegraph to the other party as soon as possible after the occurrence of the cause relied on." The Commission determined the notice was untimely because the petition was filed some ten months after curtailment began. United objects to this finding because the petition was filed several days before the curtailments related to Phase III began. However, United has not suggested that the *cause* for the Phase III curtailments was different from the cause for the earlier curtailments. The tariff required notice as soon as possible after the occurrence of the *cause* for inability to deliver gas. The Commission's decision of untimeliness is within its authority to determine tariff compliance and is supported by substantial evidence.

The Commission also determined that the petition did not give adequate notice of the force majeure. The petition refers only to the curtailment provisions in section 12. It does not state that it gives notice of force majeure, nor does it refer to section 11. The few references in the petition to the gas shortage, then, cannot fairly be said to notify the customers that United is invoking its force majeure clause. Again, the Commission's determination is supported by substantial evidence.

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out its obligations under the Service Agreement, other than to make payments due thereunder, it is agreed that on such party giving notice and full particulars of such force majeure in writing or by telegraph to the other party as soon as possible after the occurrence of the cause relied on, then the obligations of the party giving such notice so far as they are affected by such force majeure, shall be suspended during the continuance of any inability so caused but for no longer period, and such cause shall as far as possible be remedied with all reasonable dispatch.

Second, the Commission interpreted section 11 to mean that force majeure "would not exculpate United from actions grounded in negligence or willful misconduct." Initial Decision, 20 FERC ¶ 63,070, at 65,310. The applicability of section 11 therefore "is restricted to a situation where United's conduct has been above reproach." *Id.* The Commission's interpretation of the tariff is within its authority and is rational. Any curtailments caused by United's negligence or willful misconduct are within United's control and could have been avoided by the exercise of due diligence. Thus, force majeure, by its definition, would not apply.

Third, the Commission determined that force majeure did not apply on these facts because "United was [not] forced to add new customers or to increase service to existing customers." *Id.* Supply and demand management were within United's control, the Commission determined, and therefore force majeure did not apply to the curtailments. We vacate this third reason for the Commission's determinations regarding the force majeure clause. As in the case of sections 12.1 and 12.3, it is improper for the Commission to adjudicate actual liability. In all other instances, the Commission did not make findings of fact regarding the cause of the shortage. It made only those findings necessary to interpret the tariffs or to determine whether the tariffs were in the public interest. It is inconsistent to treat the force majeure question differently. The courts adjudicating the contract actions will determine what the causes of the shortage were and whether they were beyond United's control.

IV. INTERVENORS' OBJECTIONS

The intervenors support the Commission against United's arguments. They also level three attacks on the Commission's decisions. The intervenors first argue that the Commission lacked jurisdiction to make the revised exculpatory provisions of sections 12.1 and 12.3 applicable to direct

sales customers. The intervenors also argue that the Commission erred in determining that sections 12.1 and 12.3, as revised, serve the public interest, create no undue preferences, and cause no undue prejudice. Finally, the intervenors argue that the Commission erred in making sections 12.1 and 12.3 effective November 14, 1971. In addition, Mississippi Power & Light Co. contests the Commission's construction of the substitute fuel clauses.

The Commission asserts that we lack jurisdiction of the intervenors' issues that United did not raise, for the intervenors did not file petitions for review within sixty days after Opinion No. 237-A. The Commission also asserts that Mississippi Power & Light Co. failed to raise its additional issue in its Docketing Statement. Finally, the Commission reminds us that Brooklyn Union Gas Co. and Elizabethtown Gas Co. failed to petition for rehearing of Opinion No. 237. United supports the Commission against the intervenors. We address the Commission's jurisdictional challenges.

V. APPELLATE JURISDICTION

Section 19 of the Natural Gas Act states the jurisdictional prerequisites to review the Commission's orders:

> (a) Any person . . . aggrieved by an order issued by the Commission . . . may apply for a rehearing. . . . The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. . . . No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. . . .
>
> (b) Any party to a proceeding . . . aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals . . . by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the

> order of the Commission be modified or set aside in whole or in part. . . . Upon the filing of such petition such court shall have jurisdiction . . . to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure to do so.

15 U.S.C. § 717r(a)-(b). Each of the statutory requirements must be satisfied for the court to have jurisdiction; we are not given "any form of jurisdictional discretion." *Boston Gas Co. vs. FERC,* 575 F.2d 975, 979 (1st Cir.1978). Furthermore, the Federal Rules of Appellate Procedure apply to our review of agency orders. *Miller v. United States Postal Service,* 685 F.2d 148, 149 (5th Cir.1982), *cert. denied,* 461 U.S. 916, 103 S.Ct. 1898, 77 L.Ed.2d 286 (1983).

A. Failure to Petition for Rehearing

The Commission opposes the motion of Brooklyn Union Gas Co. and Elizabethtown Gas Co. for leave to file a joint reply brief on the grounds that both failed to petition the Commission for rehearing of Opinion No. 237. Brooklyn and Elizabethtown argue that the jurisdictional requirement is satisfied so long as *any* of the participants in the court proceeding raised the objection in a petition for rehearing to the Commission.

The plain language of section 19 requires that the very party seeking judicial review must raise its objections in its own petition for rehearing to the Commission:

> Use of the definite article in the last quoted sentence ("in *the* application for rehearing," instead of "in *an* application for rehearing") makes it plain that what is referred to is the same application for rehearing mentioned earlier in subsection (b), which in turn (by reason of the same use of the definite article) clearly refers to the same application for rehearing mentioned

in subsection (a), to wit, the application *of the party who seeks judicial review.*

ASARCO, Inc. v. FERC, 777 F.2d 764, 773 (D.C.Cir.1985). We join the D.C. Circuit in rejecting the contention that the jurisdictional application-for-rehearing requirement is satisfied so long as any other party raised the objection. Consequently, Brooklyn Union Gas Co. and Elizabethtown Gas Co. have failed to satisfy the jurisdictional requirements necessary for us to consider their objections to the Commission's orders.[20] We therefore deny the Brooklyn Union Gas Co. and Elizabethtown Gas Co. leave to file a joint reply brief.

B. Failure to Petition for Review

A second jurisdictional requirement is that each party seeking review of an order must file, "within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part." 15 U.S.C. § 717r(b). The Commission has moved to dismiss the intervenors' issues for want of jurisdiction because the intervenors did not file petitions for review within the sixty-day period. United has moved to strike all portions of the intervenors' briefs dealing with the additional arguments because, as the Commission argued, the intervenors failed to comply with section 19 and also because the intervenors failed to comply with Fed.R.App.P. 15 and Local Rule 15. The intervenors respond that they may properly raise additional issues through their notices of intervention, that a petition for review is not required. Alternatively, they argue that their notices of intervention should, on the facts of this case, be treated as petitions for review.

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[20] The other intervenors complied with the requirement in section 19 to raise on review only those issues for which each intervenor sought rehearing before the Commission.

1. Intervention and Additional Issues

Section 19 of the Natural Gas Act does not expressly state that intervenors in a review proceeding may not raise issues additional to those raised by the parties filing petitions for review. Nevertheless, Federal and Local Rules of Appellate Procedure, as well as case law, establish that intervention does not satisfy the Natural Gas Act's requirement for a "written petition praying that the order of the Commission be modified or set aside in whole or in part." Consequently, in a proceeding under the Natural Gas Act, we do not have jurisdiction to consider intervenors' issues that are in addition to those raised in petitions for review.

Fed.R.App.P. 15 governs review of agency orders. Fed.R.App.P. 15(a) provides that a party seeking review of an agency order "shall" file a "petition for review" with the clerk of the court of appeals. Rule 15(a) also provides that "[t]he petition shall specify the parties seeking review and shall designate the respondent and the order or part thereof to be reviewed."[21] Fed.R.App.P. 15(d) also permits intervention if the person desiring to inter-

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[21] The Rules provide a suggested form for petitions for review:

PETITON FOR REVIEW OF ORDER OF AN AGENCY, BOARD, COMMISSION OR OFFICER

United States Court of Appeals for the ____Circuit.

A.B.,
Petitioner

v. Petition for Review

XYZ Commission,
Respondent

A.B. hereby petitions the court for review of the Order of the XYZ Commisson (describe the Order) entered on ____, 19 ____.

S. ______________

Attorney for
Petitioner.

____

(Address)

vene, within thirty days of the date on which the petition for review is filed, files with the clerk of the court of appeals and serves on all parties a motion for leave to intervene. The form of the motion differs from that for a petition for review and must "contain a concise statement of the interest of the moving party and the grounds upon which intervention is sought." Although Fed.R.App.P. 15(d) does not expressly state that intervenors are limited to the issues raised in petitions for review, Fed.R.App.P. 15(a) quite plainly mandates that "[r]eview of an order . . . *shall be obtained* by filing" a petition for review in compliance with Rule 15(a) (emphasis added).

Furthermore, Fed.R.App.P. 15(a) states that the petition for review must be filed "within the time prescribed by law," while Fed.R.App.P. 15(d) states that the notice of intervention "shall be filed within 30 days of the date on which the petition for review is filed." By defining the time for filing a petition for review with reference to the statute providing for review of the agency's orders, the Rule indicates that the petition for review in Fed.R.App.P. 15(a) is the only proper form to seek review of agency action. In contrast, by specifying a separate time limitation for the filing of notices of intervention, the Rule indicates that a notice of intervention is not a petition praying for review within the meaning of the applicable statute.

Our Local Rule 15 reinforces this conclusion by making clear that only parties filing petitions for review may state which issues are to be raised for review. Local Rule 15.3.4, which controls the Docketing Statement, provides that "all parties *filing petitions for review* shall file a joint Docketing Statement which shall . . . [l]ist each issue to be raised in this review" (emphasis added). Local Rule 15.3.4 also provides that "[e]very petitioner *who files for review* after a Docketing Statement has been filed shall specify *in the petition for review* any exceptions taken *or additions* to the issues listed in the Docketing Statement" (emphasis added). In contrast, intervenors may not specify additional

issues. Rather, they must specify in the notice of intervention only "any exceptions taken to the issues listed in the Docketing Statement."

The intervenors try to avoid the clear meaning of Fed.R.App.P. 15 and Local Rule 15.3.4 by pointing to Local Rule 15.3.3, which governs intervention and states:

> *Party.* A party to a Commission proceeding may intervene in a review of the same proceeding in this court by filing a notice of intervention in the docket assigned to the petition for review of any order entered in such proceeding. The notice shall state whether the intervenor is a petitioner who objects to the order or a respondent who supports the order. *A notice of intervention shall confer petitioner or respondent status on the intervening party as to all proceedings in the docket* (emphasis added).

The intervenors argue that this rule confers on them all the rights of those filing petitions for review, including the right to raise additional issues.

The intervenors' interpretation asks too much of Local Rule 15.3.3. If Local Rule 15.3.3. means what intervenors assert, the language in Local Rule 15.3.4 allowing parties filing petitions for review to list additions to the issue in the Docketing Statement, but allowing parties filing notices of intervention to specify only "exceptions taken" to the issues in the Docketing Statement, would be meaningless. The more consistent interpretation is that Local Rule 15.3.3 confers on intervenors full ability to participate as petitioners or respondents for those issues that the parties filing petitions for review list in the Docketing Statement. Thus, intervenors' status as petitioners or respondents extends, as Local Rule 15.3.3 states, "to all proceedings *in* the docket," but not to add issues to the docket.

A contrary interpretation of intervenors' ability to raise additional issues would create an unnecessary conflict be-

tween section 19 of the Natural Gas Act and Fed.R.App.P. 15. Section 19 requires that the petition to modify or set aside the Commission Order be filed within sixty days of the order on rehearing. Fed.R.App.P. 15(a) sets the time for filing a petition for review in accord with "the time prescribed by law," in this case, the sixty-day requirement of section 19. Fed.R.App.P. 15(d), in contrast, permits the filing of motions to intervene "within 30 days of the date on which the petition for review is filed." If we permit an intervenor to raise additional issues for review, we contravene the sixty-day filing limit in section 19 by permitting filings as late as 90 days after the order on rehearing to seek modification or setting aside of the Commission's orders.[22]

If, to cure this conflict with the time limits in section 19, we require notices of intervention to be filed within sixty days of the Commission's order on application for rehearing, then we have effectively amended Fed.R.App.P. 15(d) to require notices of intervention to be filed "within the time prescribed by law," as Fed.R.App.P. 15(a) states, instead of "within 30 days of the date on which the petition for review is filed," as Fed.R.App.P. 15(d) actually states. These anomalies are avoided by our holding that intervenors in a proceeding to review FERC action may not raise issues in addition to those raised by parties filing petitions for review. Thus, interventions will not implicate section 19's jurisdictional time limits, nor require a modification of Fed. R.App.P. 15(d)[23]

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[22] The ninety days is reached when a petition for review is filed on the sixtieth day after the order on application for rehearing, as Fed.R. App.P. 15(a) provides, and the notice of intervention is filed 30 days later, as Fed.R.App.P. 15(d) provides. Since our practice has been at times to grant motions for leave to intervene out of time, as we did for Southern Natural Gas in this case, the jurisdictional time limitation in section 19 could be further eroded.

[23] Our holding also ensures that all parties seeking review will raise

Although no case has addressed the precise jurisdictional issue before us, we agree with the Seventh Circuit's decision in *Illinois Bell Telephone Co., v. FCC,* 740 F.2d 465 (7th Cir.1984), in which the court granted petitioner's motion to strike portions of an intervenor's brief attacking a portion of the FCC order that the petitioners had not challenged. The Seventh Circuit stated:

> The Association was entitled to intervene in this proceeding because it has an interest in the outcome. See 28 U.S.C. § 2348. But it was not entitled to intervene for the purpose it did, that is, to challenge rather than defend the order. If it had wanted to challenge the order it had to file a petition for review, or a cross-petition within 14 days after the filing of the first petition for review; it could readily have done either, since it was a party to the proceeding before

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their issues in time to comply with the deadlines for filing Docketing Statements, thus ensuring timely notice to all parties of the issues on appeal and of each party's posture with respect to the issue. Local Rule 15.3.4 provides that all parties filing petitions for review must file a Docketing Statement "[w]ithin 30 days of the initial petition for review, but not later than 10 days after the expiration of the period permitted for filing a petition for review." Plainly, this deadline can be met only if all parties raising issues have filed their petitions before 70 days from the order on application for rehearing.

The Clerk of this Court informed the parties that the Docketing Statements were due on August 26, 1986, ten days after the expiration of the sixty-day period for filing petitions for review. United complied with the deadline, although under our reading of Local Rule 15.3.4 its Docketing Statement was due July 16, 1986, on the thirtieth day of the filing of the initial petition for review. The intervenors, on the other hand, flouted both Local Rule 15.3.4 and the clerk of the court by filing Docketing Statements late or not at all.

While we are inclined to dismiss the intervenors' extra issues for failing to docket their issues timely, *see International Merger & Acquisition Consultants, Inc. v. ARMAC Enterprises, Inc.,* 531 F.2d 821, 825 (7th Cir. 1976), we shall dispose of their issues on jurisdictional grounds and admonish these parties to comply with the proper deadlines in the future.

> the agency. This is the rule for appeals from district courts, see Fed.R.App.P. 4(a)(3); *Martin v. Hamil*, 608 F.2d 725, 730-31 (7th Cir.1979), as well as for review of decisions of administrative agencies, see Fed.R.App.P. 1[5](a); *Bath Iron Works Corp. v. White*, 584 F.2d 569, 573 n. 2 (1st Cir.1978); 9 Moore's Federal Practice ¶ 204:11[2] (2d ed. 1983).

740 F.2d at 477. Thus, intervenors in FERC review proceedings are bound by the issues raised in the petitions for review. With regard to the issues raised in the petitions, intervenors may fully argue for or against the Commission's position. However, the intervenors may not challenge aspects of the Commission's orders not raised in the petitions for review.

The intervenors cite to *United States Steel Corp. v. EPA*, 614 F.2d 843 (3d Cir. 1979), as authority that an intervenor may raise additional issues. In *United States Steel Corp.*, U.S. Steel timely petitioned for review of an EPA order and Scott Paper Company timely filed a motion seeking leave to intervene after the time to petition for review had passed. After U.S. Steel obtained dismissal of its petition for review, the Third Circuit permitted Scott Paper Co. to continue to press its claims, even though Scott had not timely filed a petition for review. We do not read *United States Steel Corp.* as support that intervenors may raise issues in addition to those raised in petitions for review, for Scott Paper and U.S. Steel both challenged "the EPA limitations on the sulphur content of fuels in southeastern Pennsylvania" as stated in 40 C.F.R. § 52.2020(c)(18). *United States Steel Corp.*, 614 F.2d at 844. The opinion does not suggest that Scott Paper raised issues U.S. Steel did not raise, but suggests only that U.S. Steel did not adequately represent Scott Paper's interests. *See id.* Furthermore, unlike the statute authorizing review in *United States Steel Corp.*, section 19 of the Natural Gas Act confers jurisdiction in this court only over those ob-

jections that the petitioner asserts in its application for rehearing and reasserts in its petition for review. That is, our jurisdiction attaches only to those aspects of the order properly challenged, and not to the whole order. Under section 19, each party seeking review of an issue must independently establish our jurisdiction to review the issue.[24]

The cases intervenors cite from the D.C. Circuit are also inapposite. In *New South Media Corp. v. FCC,* 644 F.2d 37, 38 (D.C. Cir.1981), the court recognized what we recognize already in Local Rule 15.3.3: a party with standing to appeal may instead intervene in an appeal brought by another party to the proceeding. However, *New South Media Corp.* did not address whether the intervenor was therefore limited to the issues raised in the other party's appeal. In *California Public Broadcasting Forum v. FCC,* 752 F.2d 670, 682-83 (D.C.Cir.1985), the court *granted* the FCC's motion to strike the portions of the intervenor's brief challenging the FCC's order. The court rested on the fact that the FCC "had no opportunity to respond since [the intervenor] filed its brief *after* the FCC (to the schedule of an intervenor in support of the FCC)," and because the intervenor's "notice of intervention was inadequate to allow these arguments to be fairly introduced." *Id.* at 683. It was in its reliance on notice instead of procedure that the D.C. Circuit's reasoning differed from the Seventh Circuit's. *See id.* at 683 n. 10. Finally, although we are persuaded that the decisions of the Third and D.C. Circuits are distinguishable, to the extent they are not, we join the Seventh Circuit's decision in *Illinois Bell Telephone Co.*

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[24] Nor do considerations of "judicial economy and prompt disposition of litigation" suggest a different result. In this circuit, multiple petitions for review do not create docket confusion because "[a]ll petitions for review and other documents concerning Commission orders in the same number series (*i.e.*, 699, 699A, 699B) shall be assigned to the same docket in this Court." Local Rule 15.3.2.

2. Notice of Intervention as a Petition for Review

The intervenors argue that, despite their filing notices of intervention, we should treat their notices as petitions for review. Specifically, the intervenors assert that they complied with the Natural Gas Act because they filed notices within sixty days of Opinion 237-A and because the notices indicate an intention to seek review of the Commission's orders in whole or in part. Thus, the intervenors would have us divorce section 19 and Fed.R.App.P. 15, overlook the intervenors' deviations from Fed.R.App.P. 15 and Local Rule 15, and address the merits of the additional issues.

While we are unclear about our purported power to treat a notice of intervention as a petition for review, we decline to do so here. We cannot divorce the Federal Rules from this case, because we held that the written petition required in section 19 is the petition for review governed by Fed.R.App.P. 15(a), not a notice of intervention under Fed.R.App.P. 15(d).

Even setting aside the formal differences in the contents of petitions for review and notices of intervention, other problems remain. By identifying themselves as petitioners, the intervenors were expected to align themselves with the party petitioning for review. In no issue, however, are the intervenors aligned with United. In fact, the intervenors are aligned with the respondent on all of United's issues. Admittedly, the obvious notice problem may be cured in the Docketing Statements. Here we have the additional complication that the intervenors' Docketing Statements—assuming *arguendo* that intervenors may file Docketing Statements[25]—were not timely filed. Finally, Local Rule 15.1 requires payment of a $65.00 fee at the time

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[25] Local Rule 15.3.4 makes clear that intervenors cannot file Docketing Statements. They may only indicate "any exceptions taken to the issues listed in the Docketing Statement."

of filing the petition for review. No fee is required for notices of intervention, and intervenors have not paid or tendered the fee for petitions for review.

In sum, we are not persuaded that intervenors' notices of intervention should be treated as petitions for review, even if we in our discretion could do so.[26] Because intervenors failed to satisfy the jurisdictional requirements of section 19 of the Natural Gas Act, the motion of respondent, Federal Energy Regulatory Commission, to dismiss the additional issues raised in intervenors' Docketing Statements and to limit the issues on appeal to those raised by the sole petitioner, is granted. For the same reasons, the motion of United to strike those portions of the briefs of New Orleans Public Service, Inc., Mississippi Power & Light Co., Louisiana Public Service Commission, Louisiana Power & Light Co., and the City of New Orleans that challenge the Federal Energy Regulatory Commission's orders under review here is granted.[27]

VI. CONCLUSION

In sum, we vacate that portion of the Commission's orders that determined that force majeure did not apply on the facts.

In all other respects, the orders of the Commission are affirmed. VACATED in part, and AFFIRMED in part.

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[26] We note that Mississippi Power & Light's challenge to the Commission's interpretation of the substitute fuel clauses must be dismissed regardless of our decision on jurisdiction, for MP & L failed to raise the issue in its Docketing Statement. We also note that the substance of the intervenors' first argument has been rejected anyway in our discussion of Commission jurisdiction.

[27] Because of our disposition of the intervenors' issues, United's motion to strike portions of the briefs of the City of New Orleans and the Louisiana Public Service Commission for failure to provide page references to the record is no longer relevant to the outcome of the case, and is therefore denied.

APPENDIX H

§717. Regulation of natural gas companies

(b) Transactions to which provisions of chapter applicable

The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

§717c. Rates and charges

(a) Just and reasonable rates and charges

All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

(b) Undue preferences and unreasonable rates and charges prohibited

No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Filing of rates and charges with Commission; public inspection of schedules

Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Changes in rates and charges; notice to Commission

Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Authority of Commission to hold hearings concerning new schedule of rates

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint, at

once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(June 21, 1938, ch. 556, § 4, 52 Stat. 822; May 21, 1962, Pub. L. 87-454, 76 Stat. 72.)

§717f. Construction, extension, or abandonment of facilities

(a) Extension or improvement of facilities on order of court; notice and hearing

Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided,* That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) Abandonment of facilities or services; approval of Commission

No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) Certificate of public convenience and necessity

(A) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall enage in the transportation or sale of natural gas, subject to the jursidiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

(B) In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the

issuance of a certificate will not be required in the public interest.

(2) The Commission may issue a certificate of public convenience and necessity to a natural-gas company for the transportation in interstate commerce of natural gas used by any person for one or more high-priority uses, as defined, by rule, by the Commission, in the case of—

(A) natural gas sold by the producer to such person; and

(B) natural gas produced by such person.

(d) Application for certificate of public convenience and necessity

Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the commission shall, by regulation, require.

(e) Granting of certificate of public convenience and necessity

Except in the cases governed by the provisions contained in subsection (c)(1) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted there-

under such reasonable terms and conditions as the public convenience and necessity may require.

(f) Determination of service area

The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization.

(g) Certificate of public convenience and necessity for service of area already being served

Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company.

(h) Right of eminent domain for construction of pipelines, etc.

When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall

conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided,* That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

(June 21, 1938, ch. 556, § 7, 52 Stat. 824; Feb. 7, 1942, ch. 49, 56 Stat. 83; July 25, 1947, ch. 333, 61 Stat. 459; Nov. 9, 1978, Pub. L. 95-617, title VI, § 608, 92 Stat. 3173.)

§717*o*. Administrative powers of Commission; rules, regulations, and orders

The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

(June 21, 1938, ch. 556, § 16, 52 Stat. 830.)

§ 717r. Rehearing and review

(b) Review of commission order

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken,

and it shall file with the court such modified or new findings, which is supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

APPENDIX I

SUPREME COURT OF THE UNITED STATES

No. A-968

UNITED GAS PIPE LINE COMPANY,
Applicant,
v.
LOUISIANA POWER AND LIGHT COMPANY, *et al.*

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 2, 1988.

/s/ BYRON R. WHITE
Associate Justice of the Supreme Court of the United States

Dated this 21st day of June, 1988.

(3)

No. 88-191

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

UNITED GAS PIPE LINE COMPANY,
Petitioner,
v.
LOUISIANA POWER & LIGHT COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Louisiana Court of Appeal, Fourth Circuit

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BRIEF IN OPPOSITION OF RESPONDENT, THE CITY OF NEW ORLEANS

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QUESTION PRESENTED

Whether this Court should review a purely factual, contractual dispute that is governed by state law, that does not impinge upon the very limited federal interest involved, and that has no precedential value?

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BRIEF IN OPPOSITION OF RESPONDENT, THE CITY OF NEW ORLEANS

STATEMENT OF THE CASE

United complains that the decisions rendered by the Louisiana state trial court and appellate court, imposing liability on United for negligently causing natural gas curtailments, impinge upon a federal interest. The United States Fifth Circuit Court of Appeals (the "Fifth Circuit"), however, has stated that in this context the federal interest is extremely limited and is not applicable where a pipeline is negligent or at fault for causing a shortage on its systems.[1]

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[1] *United Gas Pipe Line Co. v. Federal Energy Regulatory Commission,* 824 F.2d 417 (5th Cir. 1987) ("*United v. FERC*").

In *United v. FERC*, the court noted that although there is a federal interest in protecting the federal curtailment scheme, "the public interest require[s] the abrogation of contract liability based solely on compliance with the filed curtailment plan, but [does] not require exculpation when a pipeline causes the shortage by negligence or wrongful misconduct."[2] The federal interest, therefore, requires only that United be exculpated from contractual liability "in all cases not based on United's fault. Uniformity of exculpation beyond those cases is not a matter of federal concern."[3] The court defined fault as being generally synonymous with negligence.

As the Louisiana state courts imposed liability on United based on their findings of United's mismanagement of its gas supply and sales programs, its improvidence, and its fault and negligence, neither the federal courts nor the Federal Energy Regulatory Commission ("FERC")[4] have any interest in this matter.[5] The Commission, in another proceeding involving the extent of the federal interest, clearly limited such interest to "strict liability":

> The Commission has a strong interest in the uniform treatment of pipelines that properly observe this goal by curtailing in accordance with their curtailment tariffs as they are required to do by Federal law. On the other hand, we do not perceive a similar Federal interest in ensuring treatment for claims of negligence or omissions in dealing with pipelines and

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[2] *Id.* at 426-27.

[3] *Id.* at 427-28.

[4] The Federal Energy Regulatory Commission ("FERC") is the successor to the Federal Power Commission ("FPC"). The FPC's functions were transferred to FERC in 1977. *See*, 42 U.S.C. § 7172(a). Both commissions are generally referred to as "FERC" or the "Commission".

[5] *Transcontinental Gas Pipe Line Co.*, 35 FERC (CCH) ¶ 61,043, 61,073 (1986) ("*Transco*").

their individual customers that are subject to court redress.[6]

In *United v. FERC*, the Fifth Circuit confirmed FERC's position that factual determinations of a pipeline company's negligence in its gas acquisition and sales program resulting in curtailments present a question of state law. Accordingly, there is no federal jurisdiction for this Court to review the state court action as there is no basis for it under either the United States Constitution or the Natural Gas Act.

A. Historical Perspective

The City Council of the City of New Orleans (the "City of New Orleans") is a local regulatory body that regulates the utilities operating within the boundaries of Orleans Parish. Louisiana Power & Light Co. ("LP&L") is an electric utility that services the Algiers section of the City of New Orleans, as well as numerous other Louisiana parishes. The service to the Algiers customers is regulated by the City. LP&L's service in other parishes is regulated by the Louisiana Public Service Commission (the "LPSC"). The LPSC and the City of New Orleans have participated in this case and in the FERC proceedings. This case was one of three consolidated cases brought against United.[7] As the other two cases have been settled, LP&L is the sole remaining plaintiff.

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[6] *Id.* at 61,080.

[7] The three consolidated cases were: *The City of New Orleans, et al. v. United Gas Pipe Line Company* (the "City case"); *Gulf States Utilities v. United Gas Pipe Line Company* (the "GSU case"); and *Louisiana Power & Light Company v. United Gas Pipe Line Company* (the "LP&L case"), this case. The City and GSU cases have been settled. The City case was settled, after the Louisiana Fourth Circuit Court's opinion had been rendered, for an amount of $75 million. The GSU case was settled during trial for an amount of $112 million.

Under the Natural Gas Act, gas sold for resale is jurisdictional, while industrial sales—including the sale of powerplant gas to electric utilities for the generation of electricity—is non-jurisdictional.[8] The contracts entered into between LP&L and United for powerplant gas were therefore non-jurisdictional contracts, which are not subject to FERC regulation.[9]

LP&L, the LPSC, and United itself considered the pipeline system through which United transported gas to LP&L in the 1960's an intrastate system. Nevertheless, without the requisite approval of the FPC, United commingled interstate gas into its intrastate system. On October 1, 1970, twenty-six days before filing its curtailment application, United filed an application with the Commission disclosing its commingling and alleging for the first time that its system was interstate. United sought and ultimately obtained a ruling that such commingling had converted its system into an interstate system.[10] On October 26, 1970, United filed another application with the Commission stating that it had encoun-

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[8] 15 U.S.C. § 717(b) (1982); *See, Federal Power Commission v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972).

[9] LP&L entered into two firm requirement gas supply contracts with United for its maximum daily requirements. First, LP&L's Sterlington Station contract was entered into on February 2, 1956 and amended on November 30, 1966, December 2, 1969, and December 31, 1974. This contract has a twenty-five year term. Second, LP&L's Ninemile Point station contract was entered into on May 6, 1968.

[10] *See generally, United Gas Pipe Line Co.*, 20 FERC (CCH) ¶ 63,070, 65,292 (1982): The Commission found jurisdiction "in Opinions 610 and 610-A, (47 FPC 245 and 1021) in 1972 and issued a certificate in 1973 by means of Opinions 661 and 661-A; (50 FPC 181 and 779). The Commission's findings of jurisdict[ion] and certification were affirmed on appeal in *Louisiana Power & Light Company v. FPC*, 483 F.2d 623 (5th Cir. 1973), *cert. denied sub nom., Texasgulf, Inc.* v. *FPC*, 416 U.S. 974 (1974), and *State of Louisiana v. FPC*, 533 F.2d 1239 (D.C. Cir. 1976), respectively."

tered a shortage on its interstate system, though not its intrastate system, seeking FERC's permission to curtail. Various stages of these curtailment proceedings have been before this Court, and this Court has held that rationing gas is applicable to non-jurisdiction sales under the trans-gas is applicable to non-jurisdictional sales under the transportation provision of Section 1 of the Natural Gas Act.[11]

Immediately upon seeking approval for curtailment, United argued that it should be able to curtail to jurisdictional and non-jurisdictional customers alike without liability. Twice FERC agreed with United, stating that United would be exonerated from liability.[12] Twice the Fifth Circuit overruled FERC's determination, finding that it was not based on a sufficiently developed record.[13]

Another FERC hearing took place to determine the extent of the federal interest in placing the monetary burden of a pipeline's shortage on the pipeline's customers. In its quest, FERC was guided by pronouncements of two respected circuit courts.[14]

In *Monsanto Co. v. Federal Power Commission*, 463 F.2d 799, 808 (D.C. Cir. 1972), the court stated the issue succinctly:

> [T]he industrial user may be able to say: Given the pickle created by the pipeline company, what the FPC did was lawful and proper as to actual subsequent rationing of the limited supply of gas, but

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[11] 15 U.S.C. § 717(b) (1982); *Federal Power Commission v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972).

[12] *See generally, United v. FERC*, 824 F.2d at 421-23; Opinion No. 606, 46 FPC 786 (1971), *rehearing denied*, Opinion No. 606-A, 46 FPC 1290 (1971); Opinion No. 647, 49 FPC 179 (1973); and Opinion No. 647-A, 49 FPC 1211 (1973).

[13] *See generally, United v. FERC*, 824 F.2d at 421-23; *International Paper Co. v. FPC*, 476 F.2d 121 (5th Cir. 1973), *State of Louisiana v. FPC*, 503 F.2d 844 (5th Cir. 1974).

[14] *United Gas Pipe Line Co.*, 20 FERC (CCH) ¶ 63,070, 65,286 (1982).

> the pipeline company is liable in damages because
> of the way it put us all in the pickle.

In *International Paper Co. v. Federal Power Commission*, 476 F.2d 121 (5th Cir. 1973), Chief Judge John R. Brown pointed out that curtailment damage suits can arise out of two possible factual scenarios and reaffirmed the D.C. Circuit's pronouncements:

> First, if a plaintiff cannot prove that "his service was reduced by anything other than a governmentally ordered curtailment resulting from an acute shortage of gas", then the "pipeline must be exonerated completely" based on the power of the federal government to abrogate private contracts to protect the public interest. The second situation would arise if the shortage "was precipitated by the pipeline's own failure to heed the signs of an impending crisis".[15]

As an example of the second situation, Judge Brown refers to pipelines having firm sales commitments, whose customers "claim that by taking on new obligations knowing full well that its resources were limited—that the pipeline has created the 'pickle' . . . and counted on the FPC to bail out with a curtailment order".

These pronouncements guided the proceedings pending before FERC. After the development of a substantial record, Administrative Law Judge Sherman P. Kimball concluded:

> Curtailment in accordance with a Commission or court-ordered curtailment plan will serve to exonerate a pipeline, provided the pipeline did not create the "pickle" in which it found itself. Of course, whether United created the "pickle" in which it found itself will be determined in court on the ques-

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[15] *Id.* at 65,286, quoting from *International Paper*, 476 F.2d at 124-32.

tion of its liability, if any, and damages to the direct sales customers herein.[16]

The Commission, affirming the Administrative Law Judge on this matter, concluded that absent United's "negligence, bad faith, fault or wilful misconduct" United would be exonerated from liability for compliance with an approved curtailment plan.[17] On rehearing, FERC did not deviate from this holding;[18] neither did the Fifth Circuit upon appeal of the FERC decision.[19]

The state courts examined in depth who "created the pickle"; they found United did so, and therefore United was held liable for the damages it caused. United seeks to relitigate the fault question in this Court. The facts found by the state courts more than support their conclusions of negligence and fault on the part of United.

B. The State Court Proceedings

On September 5, 1974, this breach of contract action was filed in state court. United unsuccessfully sought to remove this action to federal court.[20] Additionally, United unsuccessfully argued that the "total federal preemption" in this area mandated a stay of the state proceedings.[21]

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[16] *United Gas Pipe Line Co.*, 20 FERC (CCH) ¶ 63,070, at 65,311 (1982).

[17] *United Gas Pipe Line Co.*, 31 FERC ¶ 61,336 (1985).

[18] United Gas Pipe Line Co., 35 FERC ¶ 61,344 (1986).

[19] *United v. FERC*, 824 F.2d 417 (5th Cir. 1987).

[20] *City of New Orleans, et al. v. United Gas Pipe Line Co.*, 390 F.Supp. 861 (E.D. La. 1974).

[21] Both the trial court and the Louisiana Supreme Court denied United's motion to stay the state court proceedings. *City of New Orleans, et al. v. United Gas Pipe Line Co.*, Nos. 575-544, *et al.* (Civ. Dist. Ct., Parish of Orleans, La., orders entered June 26, 1979 and October 23, 1981); and *City of New Orleans, et al. v. United Gas Pipe Line Co.*, No. 81-C-3104, Supreme Court, State of Louisiana, December 22, 1981, respectively.

As is shown above, the federal interest is extremely limited. During the two and a half year state court trial, seventy-five witnesses testified in person or by deposition, and the parties extensively explored the history of the natural gas and electric utility industries and the scope of federal and state regulation thereof. From this evidence, the trial court drew the following factual conclusions.

First, the trial court found that United's improvident actions caused its shortages:

> Any shortage of gas in the 1970's on United's interstate system which may have rendered it incapable of selling and delivering to LP&L the contract quantities of gas was caused by United's improvident actions. In the 1960's United released large volumes of dedicated remaining recoverable gas reserves attached to its system. In addition, United failed to purchase and attach to its systems new gas reserves that were available in the 1960's and 1970's. Furthermore, United increased its sale of gas during the 1960's without correspondingly attaching adequate new gas reserves to supply the increased sales, although it has insufficient reserves to supply these obligations and meet its existing customer requirements. All of these actions proved to have an impact when United's ability to meet the needs of its customers and comply with its contract obligations.[22]

Second, the trial court found that United's breach of its contractual obligations was caused by events within United's control; the court listed the following actions that United could have taken had it been exercising due diligence:

> United could have prevented the gas shortage it experienced on its systems in the 1970's (a) by re-

[22] *City of New Orleans, et al. v. United Gas Pipe Line Co.*, No. 579-040 (Civ. Dist. Ct., Parish of Orleans, La., August 24, 1984), Pet. App. C, p. 86a.

taining instead of releasing in the 1960's large volumes of dedicated gas reserves then attached to its systems; (b) by purchasing and attaching additional gas reserves to its systems that were available at economic prices; (c) by not increasing sales of gas in the middle and late 1960's when United was simultaneously reducing its dedicated gas reserves; and (d) by maintaining a reasonable balance between dedicated gas supplies and contract demands of its customers.[23]

Third, the trial court found that United's management acted imprudently "in permitting its gas supplies to dwindle, relative to its delivery obligations to an amount that did not permit adequate service to customers."[24] In this regard, the court noted that:

> Though it was compensated (through the prices bargained for and included in its sales contract) for the risk of having to acquire new gas supplies to meet contract obligations, United did not act prudently to insure an adequate supply. As a result of United's improvidence, United became incapable of meeting its contract obligations for deliveries of gas and NOPSI, LP&L and the ratepayers of these companies had to pay more for the energy that United had contracted to deliver.[25]

Finally, as United's imprudence caused its need to curtail, the trial court found that United's compliance with FERC's curtailment orders did not exculpate it. The court stated:

> Although curtailment tariffs and FPC/FERC curtailment orders would ordinarily exculpate a pipeline from contractual liability for curtailments, such tariffs and orders in this case will not exculpate

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[23] *Id.* at 89a.

[24] *Id.*

[25] *Id.* at 89a-91a.

> United from its liability herein because the court is of the opinion that United's shortage of supply was induced by the unrealized expectations and imprudent decisions of United and its management.
>
> . . . The court is of the opinion that the shortage is the cause of the damages, not the action of the FPC in trying to deal with the results of United's shortage. The curtailment orders did not cause the shortage, United's imprudent management decisions caused its shortage. United's failure to deliver the contract volumes is not attributable to the FPC's curtailment plans proposed and supported by United. Its failure is due to a shortage of gas on its systems which United could have avoided by the exercise of due diligence.[26]

Turning to damages, even though LP&L prayed for more than $240 million in damages, the trial court rejected various demands, awarding LP&L a judgment in the amount of $40,309,142.00.

On appeal, the Louisiana Fourth Circuit Court of Appeal ("Louisiana Fourth Circuit"), in an opinion of more than seventy pages, found significant instances of imprudence, improvidence, fault, and negligence. One reason for the court's lengthy opinion was that United argued every conceivable defense, including federal pre-emption and numerous state law contract defenses. The Louisiana Fourth Circuit dutifully responded, discussing, but rejecting, each defense.

The Louisiana Fourth Circuit noted that "the governmental [curtailment] orders would not have been necessary as to United but for United's self-caused shortage".[27] Affirming the trial court's findings, the court described United's actions causing the curtailments as follows:

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[26] *Id.* at 94a, 97a.

[27] *City of New Orleans, et al. v. United Gas Pipe Line Co.*, 517 So.2d 145 (La. App. 4th Cir. 1987), Pet. App. A at p. 4a.

> United did not exercise the reasonable foresight that good faith performance of its contracts required. To the contrary, the evidence is that for business reasons aimed not at performance of its contracts but at saving costs, United released substantial reserves, which would have met then-current needs for several years, and did not acquire others at a time when at least some could have acquired, and increased delivery commitments by additional sales despite declining reserves. . . . United's proof does not demonstrate error in the trial judge's basic conclusion that, on both its interstate and intrastate pipelines, the exercise by United of reasonable foresight, in an effort at good faith performance of the contractual obligations it had already undertaken, long before the national gas shortage, would have enabled United to perform those contracts.[28]

Further, the Louisiana Fourth Circuit affirmed the trial court's finding that had United exercised due diligence it could have prevented its shortage. The court stated:

> The trial judge's factual conclusion, reasonably supported by the record, was that by the exercise of due diligence, in not releasing reserves, in acquiring reserves when it could have done so, and in not committing itself to further deliveries by added sales atop its preexisting contractual obligations, United could have prevented the shortage that its own actions caused. In such a factual situation, the *force majeure* clauses by their own definition do not apply and therefore did not suspend United's obligations.[29]

Finally, the Louisiana Fourth Circuit reaffirmed the trial court's conclusion that:

> On both its interstate and intrastate pipelines, the exercise by United of reasonable foresight, in an ef-

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[28] *Id.* at 15a.

[29] *Id.* at p. 16a.

> fort at good faith performance of the contractual obligations it had already undertaken, long before the national gas shortage, would have enabled United to perform these contracts.[30]

The court increased LP&L's damage award to $90,-014,543.00. Subsequently, it denied rehearing, and the Louisiana Supreme Court denied United's Petition for Writs of Certiorari or Review,[31] despite United's attempt to create the implication that the Louisiana Supreme Court ought to review the lengthy decisions to "comply with" the Fifth Circuit's decision. The Louisiana courts, in evaluating the arguments of United, apparently concluded that the findings of negligence were so overwhelming, that they more than met the test enunciated by the Fifth Circuit.

REASONS FOR DENYING THE PETITION

I. This factual dispute presents a contractual liability issue governed by state law: federal preemption is inapplicable, as negligence was established.

The Louisiana Fourth Circuit correctly concluded that this factual, contractual dispute is governed by state law. The court stated that:

> Notwithstanding that federal orders or tariffs may override any state law liability akin to strict liability or liability without fault, breaches of contract not only by willful misconduct, but also by negligence or lack of due diligence, are governed by state law standards.[32]

Hence, it properly distinguished the limited federal interest from the state law questions. Its focus is precisely the one subsequently described by the Fifth Circuit.

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[30] *Id.*

[31] Pet. App. B at 76a; Pet. App. D at 114a, respectively.

[32] Pet. App. A, p. 18a.

The Fifth Circuit established that in order to determine fault or negligence, a state standard rather than a uniform federal standard is applicable.[33] Whether there is fault or negligence, therefore, must be decided by a court applying principles of state law. This is exactly what the Fourth Circuit considered its task, as is shown by the above quotation.

In this protracted litigation, the Louisiana state courts developed one of the most extensive records ever compiled in the state courts' history.[34] United, nonetheless, now invites this Court to re-determine whether the numerous factual findings developed in a two and a half year long trial are sufficient to support a finding of negligence. United asks this Court to second-guess the trial and appellate courts of the State of Louisiana, and suggests that this Court ignore the numerous acts of negligence and mismanagement found by the state courts. Such would not only be a waste of judicial resources, but also outside this Court's jurisdiction: this Court does not review findings of fact.

United's allegation that the Fifth Circuit created a new "federal standard" of negligence is an attempt to contrive a federal pre-emption argument where there is none. As the Fifth Circuit stated:

> While United's argument is expressed as a quest for a uniform federal standard to avoid undue prejudice or preference to anyone, its objective is plainly a uniform requirement of greater culpability to avoid judgments against it. United's arguments are not persuasive.[35]

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[33] *United v. FERC*, 824 F.2d at 426-31.

[34] The trial court heard testimony comprising over 42,000 pages of transcription and reviewed over 1,654 exhibits, consisting of at least 10,000 to 20,000 additional pages.

[35] *United v. FERC*, 824 F.2d at 426.

Nevertheless, United alleges that the Fifth Circuit imposed a three-part "federal standard" of negligence: first, that it imposed an "objective unreasonableness" standard; second, that it placed on "the customers claiming damages" the burden of proof; and third, that it imposed a "proximate cause" requirement. What United has labeled as a new three-part "federal standard", however, is not only dicta, it is contrary to the Court's assertion that the federal interest is limited to "strict liability or liability without fault". Once such threshold is passed, and negligence is found, such negligence is determined in accordance with *state*, not *federal* law.

The Fifth Circuit, *sua sponte*, volunteered guidance: "A state's use of labels, 'negligence' or 'fault' thus does not necessarily satisfy the federal standard." [36] Ironically, United uses these dicta to create a new "federal" standard, which it calls the "objective unreasonableness" test. Contrary to United's contention,[37] this three-part "federal standard" allegedly established by the Fifth Circuit is clearly not part of that court's holding. The Fifth Circuit's holding was merely an affirmance of the FERC order stating that pipelines are exonerated "for contract damages arising from deliveries of natural gas curtailed in compliance with the filed curtailment plan unless United, through negligence, bad faith, fault or wilful misconduct caused the need for curtailments".[38]

Even if the merely advisory character of the Fifth Circuit language is applied in evaluating the state court decisions, it is clear that the Louisiana Fourth Circuit's factual findings fully comply with United's alleged "federal standard". First, United's argument that the Fourth Circuit failed to apply this "objective unreasonableness"

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[36] *United v. FERC*, 824 F.2d at 429.

[37] Pet., p. 15, n.16.

[38] *United v. FERC*, 824 F.2d at 420.

standard is without merit, as United merely states that the state court failed to use the label "objective unreasonableness". The Louisiana Fourth Circuit clearly found that under the then-existing circumstances United's actions were unreasonable. United is attempting to place form over substance. As the Fifth Circuit warned, legal "labels" are not dispositive: what is dispositive are substantive factual findings. United's liability is grounded in substantial factual and evidentiary determinations. As previously noted, the Louisiana Fourth Circuit found that, taken alone, United's mere failure to deliver powerplant gas was insufficient to impose liability. But that court concluded that United's acts of mismanagement, its releases, and its increased sales in an effort to boost its own financial rewards caused the shortage of gas, and that these actions, taken together, were sufficient to impose liability on United.

Contrary to United's assertions, the Louisiana Fourth Circuit's findings were made in the context of an evaluation of contemporaneous events and data. United introduced massive evidence regarding contemporaneous events, but the state courts found that such did not exonerate United. The trial court and the Louisiana Fourth Circuit also considered testimony and evidence presented by the plaintiffs which illustrated the then-current economic environment in the industry as then-known to United. Memoranda, letters and other documents all illustrated United's knowledge and awareness of these factors at the time it took its liability-causing actions. Accordingly, the state courts found United's actions "objectively unreasonable".

Second, United argues that the Louisiana Fourth Circuit misapplied the burden of proof. Under this "federal standard", the burden of proving United's culpability for causing the shortage lies with "customers seeking to impose curtailment liability upon United". United contends that the Louisiana Fourth Circuit reversed the burden

requiring it to prove that its actions were reasonable. United, however, fails to acknowledge that the plaintiff through testimony and evidence, as reflected in a voluminous record, proved to the trial court's and the Louisiana Fourth Circuit's satisfaction that United's actions of releasing reserves, not acquiring additional gas, increasing sales, and injecting interstate gas were negligent acts. Moreover, United's actions were found to be the sole cause of its shortage, and United's actions were found to be "not reasonable in the context of firm requirements contracts".[39]

The Louisiana Fourth Circuit held essentially that United's actions were not reasonable under the circumstances as they were "the failure to exercise reasonable care—they were negligent". The extensive findings in the state courts' opinions show that the plaintiff ("the customer seeking to impose curtailment liability upon United . . .") presented sufficient evidence to prove United's negligence.

Finally, United asserts that even assuming its actions were negligent, it is not liable because the Louisiana Fourth Circuit allegedly failed to apply the "proximate causation" test. Once again, United is attempting to place form over substance. The courts found that United's actions were the sole cause of its shortage. This is evident from the express wording used by the court: "[t]he reason there was a 'shortage' was that United released those reserves."[40] Moreover, the state courts

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[39] Pet. App. A, p. 9a.

[40] *Id.*

The Fifth Circuit's purpose for using "proximate cause" was to "highlight the element of foreseeability . . ." *United v. FERC*, 824 F.2d at 429. United's actions, were taken with a full awareness of the fact that it had insufficient gas on hand. United's management's strategy sessions, mapping out the best strategy in exculpating itself from liability, were documented by inter-office memoranda.

conditioned United's liability on a showing that the objectively unreasonable acts of United proximately caused non-delivery. As discussed above, United's actions were calculated to increase its profit margin; these actions, however, resulted in a shortage. United then attempted to blame its self-imposed shortage on FERC orders, the "nationwide gas shortage", and other 'fortuitous circumstances". Obviously, however, United's actions played a major role "in creating the situation that resulted in curtailments". Even if there would be other contributing causes of the breach, United's negligence was the primary cause. If negligence is the primary cause, liability for all damages follows.

Federal courts have applied the same standard to other pipelines, and a federal court has found United negligent. Such findings are thus not uniquely those of state courts. The "federal standard" touted by United was rejected by FERC in *Transco.*[41] In *Transco,* the federal court referred several issues to the Commission,[42] including the effect of Transco's compliance with a federal curtailment order on its liability to its customers. The Administrative Law Judge concluded,[43] and FERC agreed, that "a pipeline's adherence to effective curtailment tariffs would be a defense to pure contract damage claims, but that the pipeline could nevertheless be liable for damages flowing from its role in *creating the situation* that resulted in curtailment." [44]

letters, reports, and other evidence which is part of the 42,000 pages of the record placed before the trial court and the Fourth Circuit.

[41] *Transco,* 35 FERC (CCH) ¶ 61,043, 61,073 (1986).

[42] *C.F. Industries v. Transcontinental Gas Pipeline Corp.,* 614 F.2d 33 (4th Cir. 1980).

[43] *Transcontinental Gas Pipe Line Co.,* 21 FERC (CCH) ¶ 63,032 (1980).

[44] *Transco,* 35 FERC at 61,080. (emphasis added).

The issue of proximate cause was directly addressed by the trial court in *Texasgulf, Inc. v. United Gas Pipe Line Co.*, 610 F.Supp. 1329 (D.C. Cir. 1985), *mooted by settlement*, 617 F.Supp. 41 (1985) (*"Texasgulf"*). The plaintiff in this case was an industrial customer of United. The testimony presented and the defenses raised closely paralleled the issues considered in the case *sub judice.* Judge Gesell rejected United's attempt to find third party causes for its shortage. In *Texasgulf*, Judge Gesell stated:

> Where a plaintiff has shown, as Texasgulf has here, that a defendant's breach proximately caused the plaintiff's injury, defendant is not relieved in whole or part from liability by the existence of other contributing clauses. *See, Restatement (Second of Contracts)* § 346(a) (1981); 5 A. Corbin, *Corbin on Contracts* § 999 (1964). Even if there were other contributing causes of the breach, United's negligence was the primary cause.[45]

Nonetheless, United argues that FPC Opinion No. 647 was a contributing cause of its breach and urges that the Louisiana Fourth Circuit erred in giving no weight to this order.[46] In Opinion 647, the Commission placed 'deliveries of powerplant gas in a fourth or lowest category of priority",[47] rather than a higher category of priority. United's contention that the Fourth Circuit ignored this order is without merit. Both the trial court and the Fourth Circuit extensively addressed this issue.

First, the trial court rejected United's contention that this order exonerated it from liability for any increased fuel costs. The trial court stated that:

> Order 647 is but one in a series of orders the FPC issued as a direct result of United's shortage on its

[45] *Texasgulf*, 610 F.Supp. at 1356.

[46] Pet., p. 24.

[47] Pet. App. C, p. 96a.

interstate system and application for governmental intervention.

> . . . The Court is of the opinion that the shortage is the cause of the damages, not the action of the FPC in trying to deal with the results of United's shortage. The curtailment orders did not cause the shortage, United's imprudent management decisions caused its shortage. United's failure to deliver the contract volumes is not attributable to the FPC's curtailment plans proposed and supported by United. Its failure is due to a shortage of gas on its systems which United could have avoided by the exercise of due diligence.[48]

Second, the Fourth Circuit found that this order offered United "no escape from liability". The court stated that:

> There is only one essential thing that must be said about the federal orders adopted to cope with the shortages of gas that developed on United's interstate and its Louisiana intrastate pipelines. The essential thing is that those orders did not expropriate any of United's gas or otherwise prevent United from using whatever gas it had to make deliveries to its customers. Those orders are not the cause of United's failure to meet its contractual delivery obligations to its customers, including LP&L and NOPSI. Those orders did no more than establish, because United cannot supply all of its customers, a priority among its customers an entitlement to the gas United did have.[49]

The state courts, therefore, did not ignore this order, but rather refused to permit United to escape liability based on a mere consequence of its shortage.

As a general rule, a government order will only exonerate a party from its contractual obligation "where the

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[48] *Id.* at p. 97a.

[49] Pet. App. A, p. 16a-17a.

governmental act is not the fault of the party claiming discharge".[50] The following is a good illustration of this general rule:

> A and B make a contract under which A is to employ B for a year. B is unable to complete his performance because he is arrested and imprisoned for a burglary that he has committed. Because his inability was due to his own fault, B's duty to work for a year is not discharged, and B is liable to A for breach of contract.[51]

Like B, United's inability to perform its contractual obligations was due to its own fault: United's fault caused the shortage. Like B, therefore, United cannot rely now on governmental intervention—a curtailment order—to escape liability.

Finally, in *United v. FERC*, the Fifth Circuit stated that, "[t]he courts adjudicating the contract actions will determine what the causes of the shortage were, and whether they were beyond United's control."[52] The Louisiana Fourth Circuit did exactly that: it determined *inter alia* that United's mismanagement, its releases, and its increased sales were the "causes of the shortage", and that these causes were "not beyond United's control".[53]

This discussion shows that the state courts gave United almost unlimited opportunity to present its side of the story, but that these courts rejected the theories advanced by United due to a lack of a factual basis therefor. This is a far cry from United's statement in its petition to this Court that its assertions were not considered: they were considered but rejected. United now seeks this

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[50] *Texasgulf*, 610 F.Supp. at 1338, n.34, citing *Restatement (2d) of Contracts* § 264 (1981).

[51] *Restatement (Second) of Contracts* § 264 (1981), illustration 5.

[52] *United v. FERC*, 824 F.2d at 443.

[53] Pet. App. A, p. 10a.

Court to review the sufficiency of these findings, despite the fact that not only the state courts, but also the Administrative Law Judge, FERC, and a federal court have concluded that United was negligent. Yet another evaluation of United's actions would lead nowhere but to the same conclusion: United's negligence caused the shortage and the damages, and therefore those who suffered the damages should finally be compensated.

II. The state court decisions are not "aberrations".

United implies that it is a victim of a state court's parochial interests. In its writ application, United attempts to create the impression that the state courts were "hospitable forums" that "disregarded the federal mandates"; United alleges that LP&L and its "government allies" "urge[d] a potentially more sympathetic state court to substitute its own views for those of the federal reviewing court." [54] A review of the state court opinions, however, reveals that United's allegations have no basis in fact.

In their opinions, the state courts come to the following factual conclusions: that United released significant volumes of gas throughout the 1960's without acquiring new reserves; that United made substantial new sales commitments without acquiring new reserves; that United lost significant amounts of money on its long-term powerplant gas contracts that were entered into in the 1950's, providing an incentive to breach them; that United received higher prices from FERC on its interstate sales of gas than it received under its contractual arrangements with the utilities; that United failed to acquire available gas at higher prices; and that United generally was motivated by a desire to increase its profits rather than a desire to meet its duty as a public utility to serve its customers. None of United's suppliers reneged on their commitments to United; rather, United simply failed to

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[54] Pet., p. 16.

contract for the supplies it contractually obligated itself to provide.

Based on the above facts, the state courts concluded that United's actions were improvident and imprudent, that United mismanaged its gas supplies, and that United was negligent.

Although United attempts to portray this as a case of "hospitable" state courts gone astray, United's attempt is belied by the decisions of two other judges who have evaluated United's actions: Administrative Law Judge Sherman P. Kimball and Judge Gerhard A. Gesell.

First, after developing a substantial record, Administrative Law Judge Sherman P. Kimball concluded that no federal interest would be served by insulating a pipeline from liability based on "negligence, fault, misconduct or bad faith".[55] In determining the federal interest at stake, Judge Kimball made findings of fact clearly showing that the situation was not outside of United's control, and that United was at fault and negligent. Judge Kimball pointed out that: "[s]upply-demand management was certainly at least partially within United's control. . . . In the final analysis, it cannot be said that United was forced either to add new customers or to increase service to existing customers." [56]

Judge Kimball also noted that "it is significant that during the 1960's United was the only pipeline company that released reserves. What is particularly disturbing is that the company, according to its witnesses, gave up the reserves without even studying the impact of the loss on United's supply situation." [57] Finally, Judge Kimball observed that "United claims that its curtailments arose

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[55] *United Gas Pipe Line Co.*, 20 FERC (CCH) ¶ 63,070, 65,286 (1982).

[56] *Id.* at 65,310.

[57] *Id.* at 65,297.

from situations entirely beyond its control, but no such finding is warranted, looking at all the facts and circumstances".[58]

Second, in *Texasgulf*, a case brought by one of United's other industrial customers, Judge Gesell applied a federal negligence standard to find United liable for mismanagement of its supplies. Judge Gesell rejected United's argument that it was a victim; he stated:

> United also tries to portray itself as merely another victim of the national gas shortage that enveloped the United States in the 1970's, but United cannot so easily lose itself in the crowd. United curtailed more service in the 1970's than any other pipeline, both in terms of gross volume and volume as a percentage of sales. . . . United's curtailments also began earlier than other pipelines and the curtailments were by no means universal. . . . United's lack of due care thus had direct and dramatic effects on its ability to deliver gas during the 1970's and more than any other factor led it to breach the gas sales agreement with Texasgulf.[59]

This language is less "hospitable" to United's cause than the conclusions of the "potentially more sympathetic state courts". A "substitution" of Judge Kimball's and Judge Gesell's views for those of the state court would only create more, rather than less, liability for United. Upon Judge Gesell's finding of liability, United quickly and confidentially settled the *Texasgulf* case.

Despite United's implications to the contrary, that the Louisiana Supreme Court did not merely ignore this matter. Rather, on numerous occasions the Louisian Supreme Court reviewed this case.[60] Accordingly, the Loui-

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[58] *Id.* at 65,310.

[59] *Texasgulf,* 610 F.Supp. at 1357.

[60] Among the issues the Louisiana Supreme Court has considered in this matter are the following: United's motion to stay the state

siana Supreme Court's denial of United's Application for Writ of Certiorari or Review was not based on a mere cursory review, as United implies. The court was well aware of the issues. Furthermore, the Louisiana Supreme Court's denial of United's Application for Certiorari may lend persuasive support to the correctness of the state courts decisions: implicit in the Court's denial is its conclusion that the case was correctly decided.

III. This case would not create a meaningful precedent.

This Court's evaluation of whether the state courts' decision based on a 42,000-page transcript and thousands of pages of exhibits was supported by sufficient facts to find United negligent will have no meaningful precedential value for the future. Despite United's predictions of the future detrimental effect of this decision, the scope of this decision is limited to the case at hand, as United's other curtailment cases have been settled. United's assertions that payment of the judgment to LP&L and its customers would have dire results on its future gas acquisition program are hollow, as any liability imposed on United in this case will be borne by its erstwhile indirect parent, Occidental Petroleum Corporation, an unregulated entity.[61]

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court proceedings and numerous other issues in 1981; several motions for recusal of the trial court, the Fourth Circuit, and Louisiana Supreme Court judges, and an application by United for supervisory writs of mandamus requesting that the appeal to the Louisiana Fourth Circuit be stayed in 1985; anti-trust claims in 1986; United's application for writ of certiorari in 1988; and United's application to stay the execution of a judgment pending United's application to this Court.

Additionally, the Louisiana Supreme Court appointed *ad hoc* judges to cover the docket of the Honorable George C. Connolly, Jr. so that he might put his entire time and effort into the trial of this matter. During such *ad hoc* appointments and determinations, the claims of the parties were discussed.

[61] Pet., pp. ii-iii.

This Court could only effect any future curtailment damage suits, if such could ever be brought again, if it could change the Fifth Circuit's opinion and the three-part negligence test that that court allegedly enunciated. The Fifth Circuit's decision, however, is final, and the pronouncements of the Fifth Circuit cannot be evaluated in this Court as the decision is non-appealable.[62]

The events giving rise to this litigation occurred some twenty years ago. During that period, the natural gas industry has undergone substantial and fundamental changes. First, as a result of the curtailments of the 1970's, pipelines no longer enter into firm-price, long-term contracts. Since the 1970's, gas supply contracts are made subject to any curtailment orders that might be entered and limit the pipeline's liability for compliance with such orders.

Further, gas supplies are presently in overabundance. The problem confronting pipelines today is not how to allocate insufficient gas supplies, but rather what to do with excess gas supplies.

Finally, pipelines have taken on a new function. Rather than acting as sellers of gas—United's role herein—pipelines are now acting more and more as transporters of gas. This new role assumed by pipelines is in sharp contrast to their former role as merchants. Even though pipelines are not relieved of their duty to maintain a sufficient gas supply to meet their contractual delivery obligations, the responsibility for maintaining a sufficient gas supply under contract is centered more and more in the pipeline's customers rather than in the pipeline itself.

The above considerations mitigate against the granting of writs in this case. This Court's resources have historically not been used to evaluate factual disputes, or disputes lacking precedential value.

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[62] The decision was rendered on August 18, 1987. None of the parties sought rehearing, or a review by this Court.

CONCLUSION

The adjudication of a factual, contractual dispute between one customer and one pipeline regarding events occurring fifteen to twenty years ago is the domain of the state courts. In this case, the state courts have developed an extensive record supporting their findings of United's fault and negligence. United's attempt to contrive a "federal pre-emption" argument is doomed to failure, as the findings of fault and negligence are properly within the state court's domain.

United has fought its liability for over eighteen years. Initially, United opposed a negligence test, arguing that regardless of its actions, it should be exonerated from liability. Subsequently, United argued that only its wilful misconduct should result in liability. In this Court, for the first time, United accepts what is inevitable: the federal interest in this area is extremely limited. As the Fifth Circuit stated, the limited federal interest requires only that United be exonerated from liability if it curtailed through no fault of its own. Clearly, this very limited federal interest has been satisfied.

LP&L's customers suffered damages throughout the 1970's, and they should finally be compensated for the higher cost of electricity that they had to pay due to United's cavalier approach to its gas supply management. Therefore, for all the above reasons, United's petition for certiorari should be denied by this Court.

Respectfully submitted,

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September 27, 1988

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No. 88-191

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

UNITED GAS PIPE LINE COMPANY,
Petitioner,

v.

LOUISIANA POWER & LIGHT COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA COURT OF APPEAL, FOURTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

Faced with the inescapable fact that the state court judgment they seek to uphold deviates substantially from the federal standard of liability, Respondents Louisiana Power & Light Company ("LP&L"), City of New Orleans ("City") and Louisiana Public Service Commission ("LPSC") urge denial of certiorari on the grounds that the state courts complied with the spirit, if not the letter, of the federal standard and, in the alternative, that any failure of compliance is not sufficiently important to warrant this Court's review. In so doing, Respondents distort the decisions in question.

1. Respondents' first tack in attempting to show that the federal standard of liability presents no conflict with the

standards applied by the Louisiana Court of Appeal is to misrepresent the federal standard. The City argues that the federal interest is satisfied by a determination of "fault *or* negligence" and that, in making such determination, "a state standard rather than a uniform federal standard is applicable." Br. 13, emphasis added. LP&L contends that the standard is "contract fault drawn from the states' laws of negligence and fault." Br. 19. But if one thing is clear from the Fifth Circuit's opinion, it is that "the Commission *has* articulated a uniform federal standard of liability" and that "[t]his standard uniformly means that a customer must establish United's negligence or greater misconduct in causing a foreseeable shortage in order to recover damages." App. G. 180a, emphasis in original.

Thus, it is clear that the federal interest as articulated by the Commission and as reviewed by the Fifth Circuit will not permit contract liability for curtailment to be imposed upon United unless there has been a finding of negligence. Yet, despite repeated urging by Respondents themselves,[1] there was *no* finding that United was negligent by either the Louisiana trial court or the Court of Appeal. In an effort to create a finding where none exists, Respondents in some instances have misquoted the court opinions.[2]

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1 As a vivid example, the LPSC makes reference to specific findings of the trial court (Br. 8-9) concerning actions of United it asserts to be the equivalent of negligence. What it fails to note is that these findings were based on the LPSC's proposed findings of fact submitted to the trial court with the significant exception that LPSC proposed a finding that such conduct was "negligent" and the trial court -- while adopting the remainder of the proposed finding -- deleted the request for a finding of negligence!

2 The City asserts in its brief (p. 16):

> The Louisiana Fourth Circuit held essentially that United's actions were not reasonable under the circumstances as they were "the

Respondents argue that the difference between the federal and state rulings is simply a matter of semantics because there is sufficient criticism of United's actions by the Louisiana courts to satisfy the federal standard. But it is precisely because courts often indulge in hindsight criticism -- or as the Fifth Circuit observed, "the term 'negligence' is plastic in the hands of some courts" (App. G. 182a) -- that the Fifth Circuit made clear that the federal negligence test required the application of several essential components: (1) the burden of proof must be on United's customers to prove United's negligence or greater misconduct in causing its shortage, (2) the allegedly negligent acts must be judged under an objective standard of behavior and must have occurred when curtailments were "reasonably foreseeable and avoidable," and (3) such acts must have "proximately caused" the curtailments. *Id.* at 182a-183a.

> failure to exercise reasonable care -- they were negligent."

The quoted language, for which no citation is provided, *does not appear in the Fourth Circuit opinion.*

In another instance of misleading quotations, the City asserts:

> Nevertheless, United alleges that the Fifth Circuit imposed a three part "federal standard" of negligence .... What United has labeled as a new three-part "federal standard", however, is not only dicta, it is contrary to the Court's assertion that the federal interest is limited to "strict liability or liability without fault."

Br. 14. Again, there is no citation to this last quotation. Although the quotation implies that the Court making such assertion is the Fifth Circuit, the language in fact is taken from the Louisiana Court of Appeal judgment. *See* App. A 18a.

Obviously, these are not meaningless elements or mere afterthoughts by the Fifth Circuit. Rather, they are essential to ensure that federally regulated pipelines will not be subjected to liability for federally regulated curtailments through random fault-finding. Yet, the Louisiana state courts failed to satisfy *any* of these elements.[3]

First, as Respondents concede and then attempt to explain away, the Louisiana Court of Appeal held that any federal interest was relevant only by way of defense and "repeat[ed] that it was United's burden to prove its defenses . . ." App. A at 15a. Under the federal standard, United should not have had the burden of proving it was *not* liable. The burden of proving negligence should have been on the Plaintiffs.

Second, the Louisiana judgment never refers to the element of foreseeability -- a requirement that the Fifth Circuit termed a "necessary element" of the negligence standard. App. G 183a. Moreover it is spurious to contend, as Respondents do, that application of the foreseeability requirement could not have affected the results. It is inconceivable, for example, that the Louisiana Court of Appeal could have found that curtailments that began in 1970 would have been reasonably foreseeable and avoidable when United released some gas reserves in 1962.

Similarly, the Louisiana Court of Appeal never measured United's conduct against a "standard of objective reasonableness." *Id.* Had the court done so, it is extremely doubtful that certain of United's actions held to subject it to liability, such as adding sales commitments certificated by the Commission as

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3 It was clear to the Fifth Circuit that the Louisiana Court of Appeal had not applied the federal standard of liability. The Fifth Circuit's polite, but pointed, rebuke of the Louisiana court's judgment can be found in App. G 181a-182a, n.15 and is discussed in United's petition at 11.

being in the public interest, could have been found "negligent."

Finally, the Louisiana Court of Appeal never undertook the proximate cause analysis required by the Fifth Circuit. Rather, the Louisiana court reasoned that, but for the actions complained of, *e.g.*, the release of reserves and additions of service, United would have had gas available for customers like LP&L and would not have been required to curtail service. No consideration was given to the nationwide shortage of gas -- an event recognized by this Court throughout the 1970's -- and no effort was made to determine whether some portion of United's curtailments was due to these external factors rather than to attribute the curtailments *entirely* to United's own conduct.

Try as they may, Respondents cannot bridge the gap between the federal standard and the liability standards applied by the Louisiana Court of Appeal. The differences are stark and substantial. They cannot be glossed over by reference to "other decisions."[4] Nor should they be ignored because -- as Respondents erroneously suggest -- granting United's petition would somehow require this Court's review of a voluminous

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[4] The "decision" of Administrative Law Judge Sherman P. Kimball referred to by Respondents (City Br. 22-23; LP&L Br. 22-23), was the initial decision reviewed by the Commission in Opinion No. 237. In that initial decision, the administrative law judge expressly declined to reach any conclusions on United's negligence or willful misconduct and, to the extent that he made any factual findings relevant to such conclusion (many of which supported United's position), the Commission expressly declined to adopt them. App. E. 127a-129a. As for Judge Gesell's *Texasgulf* decision, it was based on a *different* record between *different* parties, and more importantly, was entered *before* Opinion No. 237 and the Fifth Circuit opinion were issued -- and thus did not apply the federal negligence standard articulated in those opinions.

trial court record.[5] United's petition seeks only a determination that the Louisiana state courts failed to apply the federal legal standard and that they must do so to adjudicate United's alleged liability for curtailments.

2. LP&L further argues that, if the Louisiana Court of Appeal judgment conflicts with the Fifth Circuit's opinion, "the Fifth Circuit must have overstated the case and Opinion No. 237 should be followed, not the Fifth Circuit." Br. 20, n.44. The authority for this contention is that "Louisiana law is that United States Supreme Court decisions on federal issues are binding authority, but lower federal court decisions are merely persuasive." *Id.*, citation omitted.

LP&L's contentions demonstrate the need for this Court to make clear that final federal appellate court affirmations of agency orders are not merely persuasive, but are binding authority. Even assuming *arguendo* that the Louisiana courts believed that the Fifth Circuit decision "overstated the case," they cannot be allowed the option of ignoring that decision and following instead their own construction of the federal agency's order. Pet. 12. If the Supreme Court of Louisiana concurred in LP&L's argument (which was presented to it) and declined to follow the Fifth Circuit's decision on this ground, then it has flouted the exclusive statutory review procedures under the NGA and raised a matter of significant federal concern that should be addressed by this Court.

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5 Ironically, while Respondents admonish this Court to refrain from reviewing the factual record, they attempt to reargue the case presented to the trial court. The most egregious example is the LPSC's devotion of nearly half its brief (pp. 13-25) -- without once quoting or even citing to the Louisiana Court of Appeal's decision -- to its contentions selectively drawn from the 42,000-page record that is not before this Court. These contentions merely show that these hotly disputed factual contentions need to be resolved in the context of the federal negligence standard rather than under the amorphous standards applied by the Louisiana courts.

3. Finally, a review of the matters at issue belies the Respondents' contention that any conflict between the federal and state court decisions is unimportant.

First, even if the only harm resulting from the Louisiana courts' failure to apply the federal standard were the erroneous imposition of a $180 million judgment against United, the appropriate relief under such circumstances would be summary reversal -- not denial of certiorari. This result would permit United to receive a fair trial under proper standards of liability.

But the federal/state conflict here has importance beyond United and the Respondents. As discussed above, the conflict implicates the statutory review scheme under the Natural Gas Act and comparable legislation by questioning whether certain federal appellate decisions affirming agency orders are binding on state courts. The conflict also involves state contravention of a valid and final federal agency order, which raises the question of whether federal interests and policies in the regulation of natural gas pipelines are being undercut. *See generally* Pet. 13-20. *See also* Brief of Interstate Natural Gas Association of America as Amicus Curiae ("INGAA Br.") 7-10.

The Respondents attempt to denigrate the conflict's importance by asserting that "the natural gas pipeline industry has fundamentally changed" (LP&L Br. 15; City Br. 25), and that the "problem confronting pipelines today is not how to allocate insufficient gas supplies, but rather what to do with excess gas supplies." (City Br. 25.) Ironically, pipelines currently attempting to deal with "excess gas supplies" are releasing reserves -- the very conduct placed in jeopardy by the Louisiana judgment. As discussed in the petition, pp. 25-26 and in the INGAA brief, pp. 9-10, the Louisiana Court of Appeal's reasoning poses a real and current dilemma for pipelines: will they be held liable in the future for their current releases even if the releases are based on reasonable business judgments under today's conditions?

Despite Respondents' effort to suggest that changes in the industry have made this case less important, the inescapable fact is that United and other interstate pipelines are still heavily subject to Commission regulation -- both in time of shortage and in time of surplus -- and most of their supply management decisions will remain subject to Commission scrutiny. Pipelines will also continue to be subject to claims brought in various courts as a result of those decisions. Thus, the Commission has a continuing and substantial interest in the efficacy of its orders, as made final by the exclusive review procedures of the Natural Gas Act, and in ensuring that various state courts are not free to ignore those orders or to impose liability in a manner significantly different from that mandated by the Commission.[6]

For the reasons set out in United's petition for a writ of certiorari and in this reply memorandum, the petition should be granted.

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6 If there is any doubt that the Louisiana courts' failure to follow the Commission's liability standard adversely affects federal interests, United respectfully suggests that the Court request the Commission's views.

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In The
Supreme Court of the United States

October Term, 1988

UNITED GAS PIPE LINE COMPANY,

Petitioner,

vs.

LOUISIANA POWER & LIGHT COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The Louisiana Court of Appeal, Fourth Circuit

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BRIEF FOR LOUISIANA PUBLIC SERVICE COMMISSION IN OPPOSITION TO THE PETITION

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QUESTION PRESENTED

When the courts of a State determine that a pipeline's failure to perform its contractual obligations was caused by its own failure of due diligence, unreasonable conduct, imprudence, improvidence and inadequate planning, should this Court overrule a liability judgment against the pipeline under a preemptive federal liability standard of "negligence," simply because the word "negligence" was not used by the State courts in describing the conduct of the pipeline?

STATEMENT REQUIRED BY RULE 28.1

The Louisiana Public Service Commission (''Louisiana Commission'') is an agency created by the Louisiana Constitution. La. Constitution Article IV § 21. The Louisiana Commission is not incorporated and accordingly has no parents, subsidiaries or affiliates other than the State of Louisiana.

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STATEMENT OF THE CASE

1. United Gas Pipe Line Co. ("United") seeks a writ of certiorari to review decisions of the Louisiana State courts holding United liable for breaching gas supply contracts with Louisiana Power & Light Co. ("LP&L"). United does not dispute the courts' finding that it failed to perform the contracts. United asserts that the judgment conflicts with a preemptive federal liability standard of "negligence" that is applicable to its contract curtailments. This negligence standard was finally articulated by the United States Court of Appeals for the Fifth Circuit after the issuance of the written opinions of the Louisiana courts in the contract litigation. Although the Louisiana courts found that United failed to exercise due diligence, engaged in inadequate planning, was unreasonable, improvident and imprudent, and that its own fault caused the curtailments, United argues that the State court decision is invalid because it assertedly does not conform precisely to the language employed by the Fifth Circuit. (App. 9c, 15a, 21a, 86a, 89a, 94a, 97a; Pet. at 21-26).

Beginning in 1971, United failed to deliver to LP&L the quantities of gas required under their long term gas supply contracts. The delivery shortfalls resulted in increased costs to LP&L for substitute fuel, conversion of generating facilities to use other fuels, and increased operation and maintenance expense. The increased costs were ultimately borne by the customers of LP&L through increased rates.

The failure of United to perform its contracts resulted in parallel State and federal litigation. In 1974, LP&L filed a contract damage suit against United in the Civil District Court for the Parish of Orleans ("district

court").[1] That suit led to the judgment that United asks the Court to review, which was issued in 1984 and affirmed on appeal by the Louisiana Court of Appeals for the Fourth Circuit ("State court of appeal") in May, 1987 (App. 77a-113a; 1a-75a). In addition, United filed curtailment proceedings before the Federal Power Commission ("FPC"). These proceedings led to the adoption by the Federal Energy Regulatory Commission ("FERC") in 1985 of a tariff provision limiting the circumstances in which United could be deemed liable for contract damages. (App. 115a-140a). The decision was affirmed and explained by the Fifth Circuit in August, 1987. (App. 141a-203a). The liability standards advocated by United in both the federal and state courts, which would have exonerated the pipeline in the absence of bad faith or willful misconduct, were rejected. (*See* App. 176a, 177a-185a; 17a-18a).

2. The contract liability trial commenced in the district court in January, 1982. The trial consumed two and one-half years. After the submission of the case, the district court issued an opinion finding that United breached its contract obligations through its own failure of due diligence. The district court specifically found that United was "imprudent." (App. 89a). This finding satisfied the "prudence" standard then advocated *by United* in the FERC proceeding as the basis for contract liability. (App. 123a-124a). The district court also determined that the "improvident actions" of United caused its gas shortage, the shortage could have been avoided by "the exercise of

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[1] The Louisiana Public Service Commission ("Louisiana Commission") which authorized the pass through to customers of the increased costs resulting from the failure of United to perform the contracts, intervened in the district court on the side of LP&L to assist in the recovery of those damages for the benefit of LP&L's customers.

due diligence," the shortage was caused by "imprudent management decisions," and United "failed to take adequate steps to determine the implications of its actions or to assure an adequate supply to meet the obligations of the company." (App. 86a, 89a, 97a, 89a). The district court did not assign the burden of proof on the "fault" issue to United, but affirmatively determined that United was at fault based on the evidence.

In a lengthy opinion, the State court of appeal upheld the decision of the district court. It affirmed the finding that "United did not exercise the reasonable foresight that good faith performance of its contracts required." (App. 15a). Further, it determined that the actions of United "did not constitute a reasonable effort to perform [the firm requirements] contracts" and did "not constitute good faith performance of its obligations." (App. 9a, 15a). In addition, in holding that the federal fault standard was satisfied, it referred to and relied on the district court's finding that the gas shortage " 'was induced by the unrealized expectations and imprudent decisions of United and its management.' " (App. 17a, 17a-18a). The State court of appeal acknowledged that the State could not impose liability "akin to strict liability or liability without fault," but determined that it could impose liability for breaches "by negligence or lack of due diligence." (App. 18a). This articulation of the appropriate standard is very similar to that ultimately articulated by the Fifth Circuit; it was adopted instead of the "willful misconduct or reckless disregard" standard then advocated by United. (App. 17a-18a).

After the decision of the Fifth Circuit, the State court of appeal denied rehearing and the Louisiana Supreme Court denied an application for review filed by

United. (App. 76a, 114a). These decisions implicitly rejected the arguments raised by United in this Court. In separate orders, the Louisiana Supreme Court denied review of rulings of the State court of appeal dismissing claims of LP&L against United and Pennzoil Co. based on alleged antitrust violations and tortious interference with contract. *Louisiana Power & Light Co. v. United Gas Pipe Line Co.*, No. 88-C-0619 (La. 1988); *Louisiana Power & Light Co. v. United Gas Pipe Line Co.*, No. 88-C-0409 (La. 1988). LP&L did not seek review of the State court decisions rejecting its claims for about $138 million for loss of generating capability and $10 million for conversion costs and certain expenses. (App. 108a, 59a, 63a, 66a-67a).

3. Before the FERC and the Fifth Circuit, United advocated a uniform federal fault standard for contract liability. At the FERC, United asserted that "prudent management" should be the standard. (App. 123a). It also argued that it should be exonerated from liability by the FERC. (App. 124a). In the Fifth Circuit, United argued that it should not be held liable absent bad faith or willful misconduct. (App. 176a).

The FERC rejected United's exoneration arguments and held that the federal interest required only that United's tariffs exculpate United from contract liability for curtailments if United did not cause the shortage of gas through its own "negligence, bad faith, fault or willful misconduct." (App. 131a-132a).

The Fifth Circuit rejected both absolute exculpation and the bad faith/willful misconduct standard proposed by United. In doing so, the court analyzed the reasons for adopting the fault standard and then determined the standard needed to accomplish those goals. The Fifth Circuit reasoned that:

a) A pipeline that curtails in accordance with the federally-approved plan cannot be held liable in damages if those damages were caused "*solely* by its compliance with the federal curtailment scheme" because it "would create incentives for the pipelines to resist a federal curtailment scheme." (App. 178a-179a) (emphasis added).

b) However, ". . . it is *not* in the public interest to immunize a pipeline from liability for its own negligence or willful misconduct." (App. 179a).

c) If mere compliance with a curtailment plan were to shield a pipeline from all liability "a pipeline could contract to deliver more gas than it knows it is able, relying on the federal curtailment scheme to immunize it. Thus, incentive for prudent management would be undermined." (*Id.*)

As the court stated, "liability flows . . . from United's mismanagement in causing the shortage of gas, creating incentives for United to manage properly its gas supply and demand." (App. 180a). Therefore, if United's mismanagement caused the shortage that necessitated curtailments, the "federal standard" affords United no exculpation. (App. 180a). Indeed, the imposition of liability would be in the "federal interest." (*Id.*)

REASONS FOR DENYING THE WRIT

Summary of Argument

1. The petition of United does not present an issue worthy of this Court's review. Contrary to United's assertion, the State court judgments attack neither the authority of the FERC nor the federal standard of liability it established. The Louisiana courts acknowledged the federal interests and applied the federal standard. The record fully supports the imposition of liability for the fault of United in breaching its contracts.

2. United incorrectly attempts to portray this case as a conflict between federal and state authorities. United is forced to emphasize semantics, because there is no substantive difference between the federal and State fault standards. The Louisiana courts found that United itself caused the shortage on its own system through a history of improper and imprudent management of its gas supply. The findings of the State courts are more than sufficient to satisfy the Fifth Circuit's "negligence" standard. In addition, they are consistent with findings made by a federal district court. These findings are not properly subject to review in this Court. *See Lloyd A. Frey Roofing Co. v. Wood,* 344 U.S. 157, 160, 73 S.Ct. 204, 97 L.Ed. 168 (1952).

3. The record provides overwhelming support for the imposition of liability under the standard articulated by the Fifth Circuit. United mismanaged its reserves and supply obligations, knowingly failed to take reasonable steps to ensure an adequate supply, misled its regulators, and diverted assets to its parent that would have been used to acquire gas supplies. Even if the fault standard articulated by the State courts were substantively different than that adopted by the Fifth Circuit, reversal of their decision would not make any difference, because the record and the factual conclusions of the State courts establish that United's misconduct far surpassed the minimal federal requirement for imposing liability. Reconsideration of the case would not lead to a different result.

4. The FPC Order allocating the gas supplies of United provides no defense to contract liability. The allocation of gas supplies was the natural result of the gas shortage caused by United's fault. Since United caused the shortage, and curtailments were the foreseeable consequence of the shortage, United is responsible for failing to

fulfill its commitments. This conclusion fully comports with the Fifth Circuit decision. Therefore, the writ should be denied.

ARGUMENT

I. The Standard Employed by the State Courts Does Not Conflict With the Federal Standard of Liability or Any Federal Interest.

United contends that the State court judgments present a "collateral attack" against the rulings of the FERC and the Fifth Circuit and "undermine" the federal interest in the regulation of interstate pipelines. (Pet. at 13 *et seq.*, 17). The State court findings, however, fully support the imposition of liability under the federal standard. United does not refer to the evidence to support its argument, but points to variations in the terminology used by the Louisiana and federal courts. These semantic variations result not from substantive differences, but from the fact that the State court decisions are independent of and predate the Fifth Circuit decision.

The Fifth Circuit affirmed the determination by the FERC that the

> federal interest require[s] the abrogation of contract liability based *solely* on compliance with a filed curtailment plan, but [does] not require exculpation when a pipeline causes the shortage by negligence or wrongful misconduct. (App. 178a) (emphasis added).

As United notes, the Fifth Circuit indicated that the party claiming damages must prove that the negligence of United caused the shortage. This standard is satisfied here. The plaintiffs undertook to prove, and did prove, the fault of United in causing the shortage. The Louisiana courts specifically found that United's mismanagement and negligence caused its shortages. Thus, the imposition of lia-

bility furthers, rather than undermines, the federal interest.

Although predating FERC Opinion 237 and the Fifth Circuit opinion, the district court decision recognized that a liability judgment must comply with a federal fault standard. It stated:

> Although curtailment tariffs and FPC/FERC curtailment orders would ordinarily exculpate a pipeline from contractual liability for curtailments, such tariffs and orders . . . will not exculpate United . . . because the Court is of the opinion that United's shortage of supply was induced by the unrealized expectations and imprudent decisions of United and its management. (App. 94a).

The trial court rejected United's contention that liability was being imposed solely because of United's compliance with curtailment orders. It found that United's curtailments, and the damages occasioned thereby, were caused by United's fault and lack of due diligence.

The district court did not assign the burden of proof on the fault issue to United. Based on the plaintiffs' affirmative proof, it made specific findings that United's own failure of due diligence and mismanagement, and *not* forces beyond its control, were the cause of the shortages and the ensuing damages. The district court found: 1) that the gas shortage was "caused by United's improvident actions," 2) United improperly released large quantities of reserves, 3) United failed to attach adequate new reserves to its system, and 4) United increased its sales without attaching adequate reserves to meet foreseeable customer requirements. (App. 86a, 90a). Moreover, the district court determined that United "improvidently" released reserves on its New Orleans District Five intrastate system, failed to attach available gas reserves, and

should have foreseen the ensuing shortage. (App. 86a). Further, the district court determined that United failed to exercise "due diligence" in managing its gas supply. (App. 89a). In addition, the district court found that United was "imprudent." It said:

> United's management was imprudent in permitting its gas supplies to dwindle, relative to its delivery obligations, to an amount that did not permit adequate service to customers. The management failed to take adequate steps to determine the implications of its actions or to assure an adequate supply to meet the obligations of the company. (App. 89a).

The district court left absolutely no doubt that the fault of United was the cause of the gas shortage and the ensuing curtailments. It stated:

> The Court is of the opinion that the shortage is the cause of the damages. . . . United's imprudent management decisions caused its shortage. United's failure to deliver the contract volumes . . . is due to a *shortage of gas on its systems which United could have avoided by the exercise of due diligence.* (App. 97a) (emphasis added).

Further, the district court found that "United's improvident actions" were the reason for governmental orders prorating gas. (App. 90a).

The decision of the district court fully conforms with the Fifth Circuit's fault standard. As the Fifth Circuit noted, "negligence is generally defined as the failure to exercise reasonable care, that is, the degree of care which a person of ordinary prudence would exercise in the same or similar circumstances." (App. 182). The district court found that United did *not* exercise the care a prudent person would have exercised in the circumstances and took unreasonable, improvident actions despite foreseeable harm to its customers. Moreover, the district court determined

that United's fault caused the gas shortage and ensuing curtailment orders. These findings were based on the affirmative proof of the plaintiffs, who undertook to prove fault in light of the pending FERC proceeding.

The decision of the State court of appeal is also consistent with the "federal standard" that United now argues must be applied. On appeal, United urged the Louisiana Court of Appeal to reject FERC Opinion 237 as an incorrect statement of the federal standard for liability. United argued for a uniform standard of exculpation absent willful misconduct or recklessness. (App. 17a-18a). Notwithstanding United's misdirection, the State court of appeal acknowledged the existence and limitations of the standard established by the FERC and approved four months later by the Fifth Circuit. The court properly started from the premise that federal tariffs may "override state law liability akin to strict liability or liability without fault," but "*breaches of contract not only by willful misconduct, but also by negligence or lack of due diligence, are governed by state law standards.*" (App. 18a). (Emphasis added). The State court of appeal considered the record and affirmed the district court's findings of fault.

The court first analyzed United's actions affecting its New Orleans District Five intrastate system. It noted that between 1962 and 1969 United released almost 2.1 trillion cubic feet of gas attached to the intrastate system and shifted another 269 billion cubic feet to its interstate system. Those released reserves would have provided sufficient gas to cover the intrastate system's needs for over thirteen years. (App. 9a). The court rejected United's contention that its management of its gas supplies was reasonable in the circumstances. (App. 11a).

The State court of appeal specifically found that the asserted added cost of performance did not justify nonperformance by an entity the size of United. (App. 11a). The court compared the added costs to the size of United's sales and determined that the cost could not reasonably justify nonperformance. As noted by United, the State court of appeal determined that the requirement of contractual performance typically is not dependent on cost. United fails to report, however, that the court went further and analyzed the cost issue, concluding that the costs were "not so excessive . . . as to justify nonperformance". (App. 11a).

The court also analyzed United's gas sales and acquisition activities for its interstate system, which served LP&L's Sterlington generating facility. (App. 10a-11a). It determined that United's reserve management practices on its interstate system were also unreasonable. While sales were increasing, the company released reserves and failed to acquire quantities of gas sufficient to even match the reserves it released much less its sales. The State court of appeal concluded:

> The record shows that there was no gas shortage in the early 1960's, and the trial judge's conclusion was therefore reasonable that United could have acquired additional reserves that, coupled with the reserves it released, would have maintained its reserve position and its ability to fulfill its contractual obligations over the lives of the contracts at issue. (App. 11a).

The State court of appeal specifically rejected United's argument that the federal curtailment orders exonerate United from liability, but it did so not because it rejected the federal authority, but because it found that the curtailment orders would not have been necessary ex-

cept for the fact that "United did not exercise reasonable foresight". (App. 15a, 4a).

The State court of appeal did state in its opinion that United had the burden "to prove its defenses." (App. 15a). This statement reflects the fact that the court was required to deal not only with the interplay of federal and state liability standards, but with a bevy of affirmative contract defenses raised by United. (App. 18a-20a, 12a-17a). Nevertheless, the court recognized that federal interests prevented the imposition of liability absent "negligence or lack of due diligence," or greater fault. (App. 18a). It affirmed the district court's affirmative conclusion "that United did not exercise the reasonable foresight that good faith performance of its contracts required" and reviewed some of the proof supporting this determination. (App. 15a, 9a-11a). The affirmative determinations of the State court of appeal more than satisfy the federal standard, especially since the court affirmed the more comprehensive findings of the district court.

United belittles the findings of the State courts, but its conduct has led to similar conclusions in federal settings. The federal district court for the District of Columbia is the only other court that analyzed United's actions relating to the shortages on its systems. That court also concluded that United was at fault in causing the shortages that led to curtailments, and this fault violated a federal fault standard of due diligence. The opinion was withdrawn after a settlement. *Texasgulf, Inc. v. United Gas Pipe Line Company*, 610 F. Supp. 1329 (D.C. D.C. 1985), *opinion withdrawn*, 617 F. Supp. 41 (D.C. D.C. 1985). The FERC denied United's request that the FERC issue findings of fact that United had not violated the federal standard of care, because the issue was beyond the

scope of the Phase III curtailment proceedings. The FERC did note, however, that the administrative law judge had suggested that improper management decisions by United were causally related to the curtailments. (App. 124a, n. 12).

Both of the Louisiana courts applied the appropriate standard in analyzing United's actions. United was found liable not simply because it failed to deliver the contract quantities of gas, but because its own negligence, fault and mismanagement caused the shortages on its systems. The federal interest is served by permitting the decisions of the Louisiana courts to stand. The semantic arguments of United provide no basis for overturning the product of years of litigation. Therefore, the writ should be denied.

II. The Finding of Liability is Supported by Overwhelming Evidence Satisfying the Federal Standard, So That Reconsideration of the Case Could Not Change the Result.

The semantic arguments of United reflect no substantive difference in the standard articulated by the Fifth Circuit and applied by the State courts. If anything, the affirmative findings of the State courts go far beyond the threshold of fault required before imposing liability under the federal standard. In addition, the evidence supports the conclusion that United's misconduct was more than negligent. Reversal of the decision—and reconsideration by the State courts—simply could not change the result based on this record.

Beginning in 1960, United embarked on three inconsistent courses of action that virtually guaranteed its inability to fulfill its contract obligations by the early 1970s. First, United aggressively increased its sales of gas. At the same time, United voluntarily released huge volumes

of dedicated reserves. Although sales were promoted and reserves released, United did not aggressively acquire new reserves to meet its increasing contract obligations.

From 1960 to 1968, United never bought as much gas as it sold or lost in any year. (Tr. at 5123; NOPSI Ex. 21). United's reserves were depleted by over 17 trillion cubic feet of gas, but only four trillion cubic feet were acquired.[2] This depletion of the system occurred in the context of facts showing that United mismanaged its system, knew the consequences of its actions, misled its regulators, manpulated the federal-state regulatory scheme, and depleted its own assets to pay inordinate dividends to its parent. These actions would satisfy virtually any liability standard.

First, United mismanaged its gas system. Gas supply and sales decisions were made and implemented without any concern for their impact. That lack of planning created the shortage and prevented United from responding effectively to the situation.

United did not have a management mechanism to match supply and demand. Indeed, its managers from relevant departments denied responsibility for ensuring that supplies were adequate. Huge volumes of reserves were released without any analysis of the consequences of this action.

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[2] NOPSI Ex. 21. Of the 2.8 trillion cubic feet acquired in 1966-1968, approximately 1.8 trillion cubic feet or 63% of *all* additions, were acquired for United's Texas intrastate system and thus were unavailable to serve either the interstate system or the New Orleans District 5 intrastate system in Louisiana. (The Texas intrastate system was transferred to Pennzoil Pipe Line Co. on January 1, 1970, less than a year before curtailments began.)

Mr. Glen Sanders, the head of United's economic planning section from 1964 into the 1970s, testified that although his department prepared five-year peak day studies, that department "never did have the responsibility for determining the adequacy of the reserves." (Tr. 5794-95). Rather, he stated, it was "top management" which had the responsibility to insure an adequate supply of gas. (Tr. at 5795).

Mr. Ed Parks, the president of the company from 1956 to 1967, as a member of "top management", should have been one of those responsible for assuring that supplies were adequate. Mr. Parks testified to the following: United "had no specific goal for the ideal amount of reserves that should be held by the company;" it had no policy regarding an appropriate reserve-to-production ratio from 1960 to 1965; he never saw any "studies of the effect of the release of reserves on the ability of the company to service customers;" and he knew of no studies performed by United in the early to mid 1960s to project the availability of future gas supplies. (Tr. at 5985; 6991; 6985; 6980).

The reserve section of the company was responsible for estimating gas supplies. Mr. Byron B. Gibbs was a member of that section from 1947 to 1965 and that section reported to him from 1967 to 1976 (Tr. at 7663-64, 7788). Mr. Gibbs testified that he was aware of the steady decline of reserves of United throughout the 1960s, but he didn't consider it necessary to bring the declining reserve situation to the attention of top management because he thought they were "on top" of the situation. (Tr. at 7785).

In 1967, a report prepared by the Arthur D. Little, Inc. consulting firm concluded that United released re-

serves "without much thought for the future." (GSU Ex. 127). The district court also concluded that United released reserves without analyzing the impact of this action. It stated:

> At the time that United entered into its contracts with NOPSI, LP&L, and its other customers, United knew that it did not have enough gas under contract to meet its delivery obligations for the life of those contracts. United was aware of an increase in competition for new reserves. By promising to sell gas that it did not own, United knew or should have known that there was a risk that it would not be able to get gas at favorable prices to meet increasing demands or obligations. *However, United managed its system on the assumption that it could always get additional gas in the future whenever needed, wherever needed and at an advantageous price to meet the obligations already committed.* (App. 89a-90a) (Emphasis added).

In sum, United acted with no regard for the consequences of its acts.

Second, the impending gas shortages were not only foreseeable but actually were made known to United long before curtailment began. In 1966, United engaged the consulting firm of Stone & Webster Service Corporation to prepare a report for United's management on the operations of the pipeline company. That report, delivered in January, 1967, specifically addressed the adequacy of United's reserves to meet its sales obligations. Stone & Webster warned United that a shortage of gas on its system was imminent. The report stated: "The present reserves will be able to meet annual sales requirements through 1968 when local shortages will begin to appear, first in the Houston intrastate system." (LPSC Ex. 41 at 62). Stone & Webster recommended that United base

its long range acquisition and sales plans on the assumption that there would be a basic shortage of natural gas. The report stated:

> Probably the most important determinant of United's long-range future is the basic question of whether United and the gas industry are faced with a shortage or surplus of new supplies relative to requirements. *We believe that the most probable condition and the one on which United should predicate its long-range planning is that of a basic shortage.* (*Id.* at 64). (Emphasis added).

The report further stated that United must acquire a total of 25 trillion cubic feet of additional reserves by 1976 in order to have a fourteen year remaining life index at that time. (*Id.*) Yet, United acquired barely two trillion cubic feet of gas in the next four years for its interstate system. (NOPSI Ex. 21; LPSC Ex. 42).

Stone & Webster was not the only independent consultant to advise United of the impending shortages. Also in 1967, Pennzoil United, Inc., United's parent, commissioned the Arthur Little firm to study United's operations. The Arthur Little report concluded that the acquisition of additional reserves was the most important factor affecting United's future and recommended an aggressive acquisition program. The report found that United's reserve position was substantially below both the national reserve-to-production ratio and the average reserve coverage of all interstate pipelines. (GSU Ex. 129, p. 2). It also concluded that the company's deliverability life was short. Arthur Little recommended that United adopt a slower rate of growth in sales—3%—which still would require a program of aggressive reserve acquisition of one trillion cubic feet of new reserves each year. (*Id.*, p. 3).

United's own economic and planning division in 1966 urged the company to acquire additional reserves. It warned that "United needs additional reserves to maintain its existing sales level of over 1.3 trillion cubic feet per year." (GSU Ex. 117, p. 8). Further, United's own five year and ten year studies conducted throughout the 1960s forecasted that the reserves then connected to United's systems would be inadequate to meet its customers' requirements. (Tr. 4975-76).

Third, United failed to take reasonable steps to prevent a shortage, even after it was informed by consultants of the impending danger. From 1967 until the commencement of curtailments United took the following steps:

(a) United increased its sales from 1.2 trillion cubic feet a year in 1967 to 1.5 trillion cubic feet a year in 1970, a sales increase of 25 per cent. (NOPSI Ex. 21, LPSC Ex. 42).

(b) Excluding sales and additions to the Texas intrastate system, United's sales and reduction in reserves due to contract terminations exceeded gas acquisitions by over 4.4 trillion cubic feet from 1967 to 1970. (*Id.*)

(c) United continued to make sales to new customers including Mississippi River Transmission Corp., Escambia Chemical Corp., and others (GSU Ex. 151, 152).

(d) United acquired a majority of its reserves for the Texas intrastate system, which could not be used to serve the interstate system or the New Orleans District Five intrastate system. (NOPSI Ex. 21, LPSC Ex. 42). More reserves were attached to the Texas system than to the interstate or District Five systems, although annual sales from the interstate and District Five systems exceeded those of the Texas system by almost six times.

(NOPSI Ex. 21, pp. 2, 3 (adjusting for Sea Robin); Tr. 6065-69).

Fourth, United repeatedly submitted inaccurate information to federal regulators suggesting that the company had more gas reserves than were actually attached to its systems. This practice confirms that United knew or should have known that it would be unable to meet its contractual undertakings.

Beginning in 1964, United was required to file annually a Form 15 with the FPC. The Form 15 was designed to provide the FPC with detailed information on gas reserves attached to pipelines subject to its jurisdiction. This information was essential to the FPC since it had to approve pipeline applications to add new or enlarged service to their interstate systems. However, United supplied the FPC with inaccurate and misleading information.

Despite United's release of huge quantities of reserves in the 1960s, its Form 15 reports to the FPC continued to reflect those released quantities as reserves attached to its system. The *Texasgulf* court described United's actions as follows:

> United's Paradise field was released to the producer, Texaco, in 1963. United's Lirette field was likewise released to the producer, Humble, in 1964. However, United's Form 15 reports for 1963, 1964 and 1965 continued to report these fields as attached to United's system. Both were major fields with reserves totaling 1,205 Bcf, and the inaccurate reporting had the effect of exaggerating United's dedicated reserves by five percent in 1964 and six percent in 1965.
>
> 610 F.Supp. at 1348.

In addition, the company's 1969 Form 15 included as dedicated gas reserves over 2.3 trillion cubic feet of gas from the "Sea Robin" project, although those reserves were not yet proven. (Tr. 7775-77).

United's misreporting of reserves to the FPC was not confined to instances of unproven or already released quantities of gas. Although the Form 15 was designed to permit the FPC to evaluate whether it should be permitted to make additional sales of gas from its *inter*state system, United included *both its inter and intra state* reserves in its reports, thereby falsely exaggerating its available reserves. A consultant employed by United described the inclusion of intrastate reserves on its Form 15 as follows:

> If the intrastate gas supply were omitted from the 1967 Form 15, it would give the appearance of a cut in UGPL's reserves of approximately six trillion cubic feet. This large apparent cut in reserves plus the fact the merger proceeding has not been completed could cause UGPL quite a bit of trouble in pending FPC proceedings. (NOPSI Ex. 33).

The "merger proceeding" referred to was the merger between United and Pennzoil.

Not only did United's Form 15 filings overestimate reserves, they also *underestimated* the company's sales requirements. Mr. Sanders testified that between 1961 and 1970 United's sales grew at an annual compound rate of 3.3%. (Tr. 5904-07). The projected sales reported to the FPC, however, were quite different. These projections were the basis for determining the potential life of United's reserves. In its 1963 Form 15 United projected that from 1966 to 1983 there would be *no* growth in sales. (Tr. 5914-15). Mr. Sanders admitted, however, that notwith-

standing this report, United in fact did not believe that its sales would be level for eighteen years. (Tr. 5226). United's 1968 Form 15 projected that over the next twenty years United's sales would *decline* on average. (Tr. 5917-19). At the same time United was submitting these decreasing sales projections to the FPC it was applying for certification to serve new customers. (Tr. 5919).

United was thus experiencing sustained growth in sales throughout the 1960s, but reporting that sales would decrease in the future. United had released huge quantities of dedicated reserves and failed to acquire reserves to even meet its then-present needs. All this time, United was aggressively seeking new customers. The reason behind its misreporting is obvious—unless United could show that its reserves were sufficient, the FPC would fail to certificate new sales. This misreporting of reserve and sales figures to the FPC establishes that United knew or should have known that it would be unable to meet its contractual requirements in the future.

Fifth, during the 1960s, United and its parent, Pennzoil, manipulated both the flows of gas and the supplies dedicated to United's various systems. Their activities indicate a knowledge that shortages would occur on those systems.

In the 1960s United operated at least three distinct pipeline systems: the New Orleans District Five intrastate system; a Texas intrastate system; and its interstate system. Only the interstate system was subject to FPC jurisdiction. It was unlawful for United to use interstate gas in its intrastate systems without prior FPC approval. 15 U.S.C. § 717f(c). Notwithstanding that prohibition,

in 1965, United began injecting interstate gas into its District Five intrastate system without obtaining an FPC certificate authorizing this action. No notice of these injections was given to the FPC or to the Louisiana Commission, which had regulatory jurisdiction over the New Orleans District Five system. Those injections of interstate gas into the intrastate system continued and expanded through October, 1970. (App. 84a-85a).

United was fully aware that FPC approval was required for the action it undertook. (GSU Ex. 132, Tr. 14815, 14870, 13585-86, 13754-56). Applications to the FPC for authorization to convert the intrastate system to an interstate system were prepared by United in early 1967 but were not submitted for over three years. (LP&L Ex. 28). While United continued to inject interstate gas into the intrastate system, it released significant reserves attached to the New Orleans District Five system and failed to acquire sufficient reserves to meet the needs of its Louisiana intrastate customers. The trial court found that United's mismanagement of its supply and demand coupled with the injections of interstate gas created a shortage on the intrastate system that "could have and should have been foreseen by United." (App. 86a).

United's failure to notify the FPC of the interstate gas injections into its District Five System was intentional. While its reserves on its interstate and District Five systems dwindled, United was acquiring *some* reserves. However, the vast majority of reserves acquired after the unauthorized flows began were attached to the Texas intrastate system that was transferred to another Pennzoil subsidiary in 1970.

United thus bought time to strengthen its Texas intrastate system, which was spun off. At the same time, United depleted reserves on its interstate and District Five systems, making shortages and the ensuing curtailments inevitable.[3] United filed its application to operate District Five as an interstate pipeline on October 1, 1970. Twenty-six days later it filed a petition with the FPC seeking to curtail deliveries of gas to its interstate customers, including District Five, alleging that there was a shortage of gas on its interstate system. (NOPSI Ex. 228). The Texas intrastate system retained its intrastate status and was not subject to FPC curtailment jurisdiction.

Sixth, beginning in 1966, Pennzoil, United's parent, systematically siphoned available cash from United, leaving the company without the resources needed to acquire additional reserves. Pennzoil effectively took control of United in 1966, five years before curtailments began. Between 1966 and 1970 United had total earnings of $80 million, but paid out $109 million in dividends to Pennzoil. (LPSC Ex. 50, at 1, 6; Tr. 20,640) In *1968 alone,* after the issuance of the Arthur Little and Stone & Webster reports urging United to drastically increase its reserve acquisitions, United paid Pennzoil $67 million in dividends, although United's entire earnings for that year were only $16 million. (LPSC Ex. 50, at 1).

This consistent pattern of paying more in dividends than United earned, despite a critical need to acquire re-

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[3] After the Texas intrastate system was spun off, the remainder of United had a reserve-to-withdrawal ratio of 9.46 while the former Texas intrastate system had a reserve to withdrawal ratio of 23.57. (Tr. 6088 *see also* NOPSI Exh. 21, pp. 2, 3, Tr. 6065-69).

serves, does not reflect prudent management. United allocated corporate resources in a manner fundamentally inconsistent with its regulatory and contractual obligations. It sacrificed the needs of customers to satisfy the desire of its parent.

These factors buttress the conclusion that United was at fault. In addition, although United contends that the Louisiana courts failed to consider United's actions vis-a-vis those of other major pipeline companies, those analyses were performed. (Pet. at 22). They reveal that United fell woefully short of industry standards in reacting to the shortages.

James T. Mitchell, an expert witness who testified on behalf of Gulf States Utilities, Inc., analyzed United's performance against the performance of thirteen comparable pipelines. (GSU Exhs. 173-180). The analysis revealed that the reserves of the comparable pipelines increased at a steady rate in the 1960s while United's reserves decreased dramatically (Tr. 7991, 8001-04). In addition, United curtailed more than any of the comparable pipelines from 1972 through 1977. (GSU Ex. 179). Furthermore, in 1979-1980, when many of the other pipelines had ceased curtailment, United was still curtailing over 40% of its firm delivery requirements. (*Id.*).

A comparison of United's performance against intrastate pipelines operating within Louisiana is also instructive. Numerous intrastate pipelines operated in Louisiana in the 1960s and the 1970s. Other than United, these included Texaco, Louisiana Intrastate Gas System, Sugarbowl, Monterey, Continental Oil Company, Creole, and Shell. (Tr. 25073-25075). Only United curtailed deliver-

ies prior to 1978. Texaco began minor curtailments in 1978, while the others had no curtailments. (*Id.*). Therefore, when compared to other intrastate pipelines, the inescapable conclusion is that United could have avoided the shortages on its intrastate system.

III. The Federal Standard Does Not Support Exculpation Of United Because of the FPC Order Eliminating the Power Plant Preference.

United argues that the Louisiana courts erred because they rejected United's contention that it should be exculpated for delivery shortfalls that followed FPC Opinion 647, which eliminated the power plant preference. (Pet. at 24). Opinion 647 changed the ranking of United's customers in the curtailment scheme so that its direct sale customers were placed in a low priority. F.P.C. Opinion No. 647, *United Gas Pipe Line Co.,* 49 F.P.C. 179 (1973). United's arguments ignore a fundamental premise of the Fifth Circuit decision. The Fifth Circuit Court ruled that United should not be exonerated from liability by compliance with a curtailment scheme, where its own fault caused a *shortage* that resulted in curtailments. The court stated:

> [I]f compliance with a filed curtailment scheme in all cases protects a pipeline from liability, a pipeline could contract to deliver more gas than it knows it is able, relying on the federal curtailment scheme to immunize it. Thus, incentive for prudent management would be undermined. (App. 179a).

This court found that liability flows "from United's mismanagement in causing the shortage of gas. . . ." (App. 180a). If the pipeline causes the shortage, and curtailments are foreseeable, the pipeline should be held liable for its failure to deliver contract quantities. (App. 183a).

Since all curtailment schemes establish delivery priorities, it is the foreseeability of the *need to curtail* which establishes liability, not the foreseeability of specific curtailment allocations.

The findings of the state courts comport with the federal standard. As the district court stated:

> The Court is of the opinion that the shortage is the cause of the damages, not the action of the FPC in trying to deal with the results of United's shortage. The curtailment orders did not cause the shortage, United's imprudent management decisions caused its shortage. United's failure to deliver the contract volumes is not attributable to the FPC's curtailment plans proposed and supported by United. Its failure is due to a shortage of gas on its systems which United could have avoided by the exercise of due diligence. (App. 97a).

The federal district court in *Texasgulf* reached a similar conclusion. *Texasgulf, Inc. v. United Gas Pipe Line Co.*, 610 F.Supp. 1329, 1339 (D.C. D.C. 1985), *opinion withdrawn after settlement*, 617 F.Supp. 41 (D.C. D.C. 1985). (A prerequisite for exculpation "is the existence of a gas shortage not caused by United's lack of due diligence.")

The Louisiana courts determined that United failed in its obligation to prudently manage its gas supplies. Curtailments were the foreseeable result of United's mismanagement. Accordingly, United should bear the expense of compensating for that mismanagement.

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CONCLUSION

This case presents no issue worthy of the Court's consideration. The federal standard of liability has already been established and the decision of the Fifth Circuit is final. This case was decided on facts not likely to be re-encountered, as United has settled most of the lawsuits arising from its curtailments. The findings of the state courts comport fully with the federal liability standard adopted by the Fifth Circuit, and the record would support liability under a more stringent standard. Given the findings already made by the courts and the evidence, a remand for consideration of the semantic variations advocated by United could not conceivably alter the result. Therefore, the writ should be denied.

Respectfully submitted,

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No. 88-191 (6)

IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

UNITED GAS PIPE LINE COMPANY,
Petitioner,

v.

LOUISIANA POWER & LIGHT COMPANY,
Respondent.

On Petition For A Writ of Certiorari To The Louisiana Court of Appeal, Fourth Circuit

BRIEF FOR LOUISIANA POWER & LIGHT COMPANY IN OPPOSITION TO THE PETITION

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September 27, 1988

56 pp

QUESTION PRESENTED

Should this Court overturn the state court's judgment for damages in a suit brought by a customer of an interstate pipeline company for breach of contract where the state court expressly acknowledged the federal interest and made the requisite factual findings of fault in accordance with standards set by the Federal Energy Regulatory Commission?

STATEMENT REQUIRED BY RULE 28.1

The parent company of respondent Louisiana Power & Light Company ("LP&L") is Middle South Utilities, Inc. ("MSU"). Affiliates of LP&L and direct and indirect subsidiaries of MSU are Arkansas Power & Light Company, Mississippi Power & Light Company, New Orleans Public Service Inc., MSU System Services, Inc., System Energy Resources, Inc., System Fuels, Inc. and Electec, Inc.

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STATEMENT OF THE CASE

Louisiana Power & Light Company ("LP&L") is a public utility, organized under the laws of the State of Louisiana, engaged in the generation, transmission, and distribution of electricity in Louisiana. At times past, UNITED[1] contracted

1. United Gas Pipe Line Company is a Delaware corporation which is, among other things, a "natural gas company" within the meaning of the Natural Gas Act, 15 U.S.C. § 717, *et seq.*, with the result that some of its actions are subject to the jurisdiction of the Federal Energy Regulatory Commission, successor to the Federal Power Commission. On June 30, 1987, pursuant to a stock purchase agreement, UNITED's liability under the judgment sought to be reviewed here was assumed by others who are the real parties in interest. LP&L shows, at pp. 12-13, *infra*, that this is reason alone to deny the petition.

to sell natural gas to LP&L for use as fuel to generate electricity.[2] Some of LP&L's fuel costs are included in its retail electric rates which are regulated by the Louisiana Public Service Commission (the "LPSC") and the Council of the City of New Orleans ("New Orleans"). The LPSC and New Orleans intervened in the proceedings below in support of LP&L's suit seeking recovery of damages from UNITED for breach of contract and other wrongful acts.

This case arises from a judgment LP&L secured against UNITED for breach of contract.[3] The Louisiana state courts found that, during the years 1971 through 1981, UNITED, because of its prior improvident acts, failed to deliver con-

2. The two contracts at issue were for sales for use at LP&L's Sterlington Station, dated February 2, 1956 and amended on November 30, 1966, December 2, 1969 and December 31, 1974, and for use at LP&L's Ninemile Point Station, dated May 6, 1968. Both contracts have expired, a fact which also suggests this matter does not warrant review by this Court. *See* pp. 15-16, *infra*.

3. Pet. App. A; Pet. App. C. LP&L filed suit September 5, 1974 against UNITED and its then parent Pennzoil Company. In addition to breach of contract, LP&L alleged violations of Louisiana antitrust and tort laws. These other actions against UNITED, and all actions against Pennzoil, were eventually dismissed. Later, LP&L filed suit against UNITED in the United States District Court for the Eastern District of Louisiana for different breaches of one of the contracts at issue here, and for violations of the Racketeer Influenced and Corrupt Organizations Act (RICO). That Court found UNITED breached certain pricing provisions of the contract during a time period which overlapped the breaches at issue here, and that "United committed a pattern of racketeering activity sufficient to trigger RICO liability." *Louisiana Power & Light Co. v. United Gas Pipe Line Co.*, 642 F.Supp. 781, 810 (E.D. La. 1986). That suit was later settled.

tract quantities of gas to LP&L, thereby causing millions of dollars of damages to LP&L and its ratepayers.[4]

A. The Application of UNITED's FPC/FERC Tariffs to LP&L

Although the issue UNITED now urges to this Court was first raised in the state courts in an application for rehearing to the Louisiana Court of Appeal,[5] UNITED has persistently proffered alleged federal interests and jurisdiction in efforts to avoid contract liability. Yet no court or agency, state or federal, has found any federal interest to be served by allowing UNITED to escape liability caused by its own fault.

UNITED initiated its program of developing federal defenses on October 1, 1970, when it filed an application with the Federal Power Commission for a Certificate of Public Convenience and Necessity to operate facilities in interstate commerce that were previously operated in intrastate commerce, including some serving LP&L. Since this application predated by only three weeks a petition by UNITED to the FPC announcing its inability to make full deliveries on its interstate system, some, including one FPC Commissioner, questioned UNITED's motives, but the FPC eventually held that UNITED's motives were irrelevant and that UNITED's flows of natural gas in interstate

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4. LP&L prayed for $240,918,849 in damages, but the District Court awarded $40,309,142, finding insufficient proof that all of LP&L's damages were caused by UNITED (Pet. App. C at 112a). On appeal, this award was increased to $89,984,003 (Pet. App. A at 75a).

5. UNITED initially argued to the state courts that the Federal Energy Regulatory Commission had misperceived the necessary federal interest, but UNITED changed its argument after it had lost state and federal appeals. *See*, pp. 9-11, *infra*.

commerce were unauthorized but nevertheless established jurisdiction in the FPC.[6] UNITED's petition to the FPC with a plan to allocate its insufficient supply was filed on October 26, 1970, and UNITED there sought a declaratory order that its curtailment plans were in accordance with its FPC tariffs and its "non-jurisdictional" direct sales contracts, including those with LP&L. This Court eventually held that it was within the FPC's jurisdiction under the Natural Gas Act to include non-jurisdictional direct sales contracts in curtailment plans.[7]

Although the FPC first thought that the mere adoption of a curtailment plan pursuant to its procedures would be an "absolute defense" to actions for breaches of contracts,[8] this view was uniformly rejected by federal appellate courts.[9]

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6. Opinion No. 610, *United Gas Pipe Line Co.*, 47 F.P.C. 245 (1972), *aff'd sub nom. Louisiana Power & Light Co. v. FPC*, 483 F.2d 623 (5th Cir. 1973), *cert. denied*, 416 U.S. 974 (1974).

7. *Federal Power Commission v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972). The FERC later held that UNITED's original tariff had no application to direct sales customers such as LP&L, but gave a new tariff retroactive effect. Opinion No. 237, *United Gas Pipe Line Co.*, 31 F.E.R.C. (CCH) ¶ 61,336 at 61,763 and 61,774 (1985) (Pet. App. E at 117a, 140a). On review, the United States Court of Appeals specifically affirmed this finding. *United Gas Pipe Line Co. v. FERC*, 824 F.2d 417 at 431-2 (5th Cir. 1987) (Pet. App. G at 187a-189a).

8. Opinion No. 606, *United Gas Pipe Line Co.*, 46 F.P.C. 786, 805 (1971); Opinion No. 647, *United Gas Pipe Line Co.*, 49 F.P.C. 179, 193 (1973).

9. *Monsanto Company v. FPC*, 463 F.2d 799 (D.C. Cir. 1972); *International Paper Co. v. FPC*, 476 F.2d 121 (5th Cir. 1973); *State of Louisiana v. FPC*, 503 F.2d 844 (5th Cir. 1974).

The FPC thereafter set for hearing various issues concerning the propriety of tariff provisions which addressed the potential liability of UNITED for breach of contract during periods of curtailment. In its order of August 9, 1978, the FERC specifically set forth the tariff issues to be heard and made clear that the ultimate issue of contract liability was for courts to decide, applying state law.[10] Similarly, it made clear that it could not decide "negligence" and related issues.[11]

After lengthy hearings, a FERC administrative law judge decided that any blanket exculpation of a pipeline company from potential liability was against the public interest and held that an appropriate tariff for UNITED would allow the imposition of contract liability, even where partial deliveries were made pursuant to a FERC-approved curtailment plan, if the curtailments were caused by the "negligence, gross negligence, or willful and wanton misconduct" of UNITED.[12] The administrative law judge also offered a detailed analysis of UNITED's gas acquisition performance prior to the onset of curtailment and the FERC, in its opinion, said that these findings "imply that United's actions in these areas are attributable to improper management decisions and have a relationship to the curtailments United's customers

10. *United Gas Pipe Line Co.*, 4 F.E.R.C. (CCH) ¶ 61,151 at 61,355 (1978).

11. *Id.* at 61,356.

12. *United Gas Pipe Line Co.*, Initial Decision on Proposed Tariff Provisions, (September 14, 1982), 20 F.E.R.C. (CCH) ¶ 63,070 at 65,305. This decision contains other articulations of the appropriate standard.

experienced."[13] UNITED took exception to this decision, requesting the FERC to make specific findings that its conduct was proper, and "to specify that a uniform Federal standard of bad faith rather than common law negligence should be applicable to curtailment damage suits."[14] The FERC rejected UNITED's contentions and approved tariff language that allowed UNITED to curtail without liability only "in the absence of Seller's negligence, bad faith, fault or willful misconduct."[15]

UNITED thereafter petitioned the United States Court of Appeals for the Fifth Circuit for review of the FERC's orders but they were affirmed by the Court in relevant part.[16] The Court specifically rejected UNITED's contention that state courts applying state law should not be allowed to sit in judgment of an interstate pipeline company's actions.[17] The FERC's orders and the decision of the Fifth Circuit are final and not before this Court for review.

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13. Opinion No. 237, *United Gas Pipe Line Co.*, 31 F.E.R.C. (CCH) ¶ 61,336 at 61,774 n.12 (1985) (Pet. App. E at 124a, n.12). The FERC said that its decision to limit UNITED's tariff made it unnecessary to "adopt as findings any statements of the judge that appear to be conclusions on the facts and circumstances giving rise to curtailment" and that debate over these was "moot." *Id.* at 61,769 (Pet. App. E at 129a).

14. Opinion No. 237-A, *United Gas Pipe Line Co.*, 35 F.E.R.C. (CCH) ¶ 61,344 (1986) at 61,787.

15. *Id.* at 61,793 n.22 (Pet. App. F at 152a, n.22).

16. *United Gas Pipe Line Co. v. FERC*, 824 F.2d 417 (5th Cir. 1987) (Pet. App. G).

17. *Id.* at 428-29 (Pet. App. G at 181a-184a).

B. The State Court Proceedings

UNITED's attempts to interpose a "federal interest" defense to LP&L's contract claims took various forms in the state court proceedings. UNITED first sought removal of LP&L's claim to the United States District Court for the Eastern District of Louisiana by asserting that the case presented a federal question, but the federal district court held that the state court did have jurisdiction.[18] UNITED thereafter twice sought a stay of the state court proceedings, asserting that the FERC had primary or exclusive jurisdiction to consider LP&L's complaint and that numerous issues should be first referred to it. Those requests were denied by the state courts.[19] The case was then tried on the merits without a jury.[20]

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18. *City of New Orleans v. United Gas Pipe Line Co.*, 390 F.Supp. 861 (E.D.La.1974).

19. The District Court denied UNITED's motions June 26, 1979, and October 23, 1981. UNITED's application to the Louisiana Supreme Court for a remedial writ to order such a stay was also denied. *City of New Orleans v. United Gas Pipe Line Co.*, No. 81-C-3104, (La. Dec. 22, 1981).

A number of federal district courts hearing similar lawsuits did refer issues to the FERC, some of which the FERC refused to consider, including contract liability and negligence issues. *United Gas Pipe Line Co.*, 4 F.E.R.C. (CCH) ¶ 61,150 at 61,352-355 (1978). One federal district court withdrew its referral order, citing inordinate delay. *Texasgulf, Inc. v. United Gas Pipe Line Co.*, 610 F. Supp. 1329, 1332 (D.C. D.C. 1985), *mooted by settlement*, 617 F.Supp. 41 (1985).

20. The trial was one of the longest in state history. It began on January 7, 1982 and ended on April 5, 1984. Over 42,000 pages of testimony were transcribed and over 1600 exhibits were accepted into evidence. Most of the disputed factual issues related to the inadequacy of UNITED's performance which led to its inability to deliver contract quantities.

Contrary to UNITED's fundamental, but erroneous, assertion to this Court, the state courts fully acknowledged the federal interest in curtailments and UNITED's FPC/FERC tariffs. The District Court, in its Reasons for Judgment, squarely stated that:

> "Although curtailment tariffs and FPC/FERC curtailment orders would ordinarily exculpate a pipeline from contractual liability for curtailments, such tariffs and orders in this case will not exculpate United from its liability herein because the Court is of the opinion that United's shortage of supply was induced by the unrealized expectations and imprudent decisions of United and its management."[21]

The District Court supported its opinion of imprudent management by UNITED with specific and lengthy findings of fact. UNITED's disagreement with these findings forms the basis of its petition to this Court but such a factual dispute does not justify a writ of certiorari.[22]

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21. Pet. App. C at 94a. Although UNITED states the District Court did not specifically find it "negligent" (Pet. 9, n.9), this is an effort to obfuscate through semantics since the District Court repeatedly found it "imprudent," (Pet. App. C at 89a, 90a, 94a, 97a), "improvident," (Pet. App. C at 85a, 86a, 90a), not exercising "due diligence," (Pet. App. C at 89a, 97a) and replete with "failure" (Pet. App. C at 84a, 85a, 86a, 89a, 90a, 91a, 97a).

22. The granting of a writ of certiorari to review a matter that primarily involves questions of fact is improvident. *NLRB v. Hendricks County Rural Electric Corp.*, 454 U.S. 170, 176 n.8 (1981); *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508, 509 (1924). This Court has declared its reluctance to disturb factual findings to be particularly great where, as here, two courts below have concurred in the findings. *United States v. Doe*, 465 U.S. 605, 613-14,

On appeal to the Louisiana Court of Appeal, UNITED again erroneously argued that some federal interest totally preempted the state court's ability to decide the case. Alternatively, it argued that it could only be held liable if some "willful misconduct" were shown.[23] UNITED specifically urged the Louisiana Court of Appeal *not* to apply the standards established by the FERC in its Opinion No. 237.[24]

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22. **(continued)**

(1984); *Rogers v. Lodge*, 458 U.S. 613, 623 (1982); *Berenyi v. Immigration Director*, 385 U.S. 630, 635 (1967); *Blau v. Lehman*, 368 U.S. 403, 408-09 (1962); *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949).

The findings of fact made by the District Court, and affirmed by the Louisiana Court of Appeal, are reasonable and fully supported by the record. They are similar and consistent with the findings of imprudent management made earlier by the FERC administrative law judge and those made later by the Honorable Gerhart Gesell, United States District Judge, in *Texasgulf, Inc. v. United Gas Pipe Line Co., supra.*

23. In a Reply Brief to the Court of Appeal, UNITED argued: "In general, appellees agree with the trial court that the standard is whether United was 'imprudent' or 'improvident' in managing its gas supplies, while United asserts that some type of willful misconduct—as opposed to mere imprudence—must be shown." Reply Brief of UNITED, December 19, 1985, at 132.

24. In the same brief, UNITED argued: "While Opinion No. 237 concludes that culpability can consist of negligence in addition to 'bad faith, fault or willful misconduct,' the gross failing of the opinion is that it is entirely conclusory on the fault standard and never addresses the practical and policy reasons why a showing of simple negligence should not preclude a pipeline from relying on its tariff and/or Commission curtailment orders as a defense to curtailment damage claims." *Id.* at 144 (footnote omitted).

The Louisiana Court of Appeal rejected UNITED's argument that some federal interest required a higher degree of fault than the standard that was adopted by the FERC, but specifically acknowledged that the federal interest would override state law liability for breach of contract without fault:

> "The trial court concluded that federal curtailment orders and tariffs would not exculpate United from contractual liability for curtailments in the instant cases because United's shortage 'was induced by the unrealized expectations and imprudent decisions of United and its management.' United argues that the fault standard for determining whether exculpation lies under United's tariff and Commission orders is a federal fault standard, and that the federal standard is willful misconduct or reckless disregard of the pipeline's service obligations.
>
> "United does not cite any authority establishing this separate 'federal interest' argument. We conclude that it is inconsistent with the expressions of cases like *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 96 S.Ct. 1978, 48 L.Ed.2d 643 (1976); *International Paper Co. v. Federal Power Com'n*, 476 F.2d 121 (5 Cir. 1973); *Monsanto Co. v. Federal Power Com'n*, 463 F.2d 799 (D.C.Cir. 1972); and *Texasgulf, Inc. v. United Gas Pipe Line Co.*, 610 F.Supp. 1329 (D.C. D.C. 1985). These cases support the view that, *notwithstanding that federal orders or tariffs may override any state law liability akin to strict liability or liability without*

fault, breaches of contract not only by willful misconduct, but also by negligence or lack of due diligence, are governed by state law standards. This defense seems to be no more than a restatement of the 'duly constituted authorities' clause defense discussed earlier, and we deem it equally insufficient to avoid United's liability."[25]

On April 30, 1987, the Louisiana Court of Appeal rendered its decision affirming the District Court's judgment of liability. On August 18, 1987, the United States Court of Appeals for the Fifth Circuit rendered its decision on UNITED's Petition for Review of FERC Order Nos. 237 and 237-A, rejecting UNITED's argument that a standard of a higher degree of culpability than that described by the FERC was required to support a judgment in contract and affirming in relevant part the FERC's orders. UNITED then filed a Petition for Rehearing in the Louisiana Court of Appeal, recasting its "federal interest" arguments to conform to its view of the Fifth Circuit opinion, along with a reurging of numerous other issues. The Louisiana Court of Appeal denied rehearing,[26] and the Louisiana Supreme Court denied UNITED's petition for a writ of certiorari or review.[27]

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25. Pet. App. A at 17a-18a (emphasis added).

The Court of Appeal also considered and rejected a myriad of alleged defenses offered by UNITED under the Louisiana Civil Code and the law of contracts. UNITED's complaint (Pet. at 21) that the Louisiana Court of Appeal "Regard[ed] the case largely as a private contractual dispute" is disingenuous since UNITED specifically urged such defenses to that court.

26. Pet. App. B at 76a.

27. Pet. App. D at 114a.

REASONS FOR DENYING THE PETITION

I. This Case Presents No Substantial Federal Question And Is Not Worthy of Review

The asserted need for this Court to protect "federal interests" is a pretext to salvage a case lost on the merits. As the Fifth Circuit observed in denying UNITED's Petition for Review of FERC Opinion Nos. 237 and 237-A:

> "United, then, fears application by courts and juries of Commission standards. While United's argument is expressed as a quest for a uniform federal standard to avoid undue prejudice or preference to anyone, its objective is plainly a uniform requirement of greater culpability to avoid judgments against it. United's arguments are not persuasive."[28]

No federal interest will be served by review of this case or reversal of LP&L's judgment, because the state courts which rendered that judgment fully acknowledged the federal interest. Moreover, any federal question that ever existed concerning the pipeline's liability under the federally approved tariff has been mooted by the assumption of UNITED's liability by others; the federal interest alleged to have been abused is the need to protect a pipeline company from contract liability for mere compliance with federal agency orders and to prevent a pipeline company from granting undue preferences or otherwise adversely affecting its other customers if such contract judgments are enforced.

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28. Pet. App. G at 177a.

UNITED, in its petition, quotes from Opinion No. 237 and argues:

> "The Commission pointed out that '[a]-wards under such circumstances would either directly (by being passed on through rate increases) or indirectly (through weakening the pipeline's financial condition) adversely affect the remaining customers of United.' "[29]

Yet, in its disclosure made pursuant to this Court's Rule 28.1, UNITED states that two wholly-owned subsidiaries of its former parent Occidental Petroleum Corporation have "assumed liability for the payment of any judgment that ultimately might be entered in this case."[30] Satisfaction of LP&L's judgment, therefore, will have absolutely no effect on United Gas Pipe Line Company, its jurisdictional rate-payers, any aspect of its business, or any matter before the FERC.

UNITED makes no showing that its liability flows from mere compliance with agency orders; the state courts specifically found otherwise. Even if such a showing could be made, it would only present a moot federal question since the liability will not be borne by the entity that claims it did nothing more than follow agency orders.

Moreover, while UNITED contends that is alleged issues are not "solely of historical interest,"[31] such is clearly the case. No pipeline company is in curtailment today and the

29. Pet. at 19.

30. Pet. at ii-iii.

31. Pet. at 25.

industry is faced with oversupply.[32] UNITED has settled all other active lawsuits.[33] Only one other pipeline company faced significant liability for curtailment, and it has settled an adverse judgment.[34]

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32. The most significant question facing the Interstate pipeline industry today is who will bear the cost of this oversupply, especially as the interstate pipeline companies become "open access" transporters of gas sold by others. The FERC has estimated the accrued liability of interstate pipelines for this oversupply to be over $8 billion, but expressed hope that it would be reduced by settlements. *Notice of Issuance of Proposed Policy Statement and Opportunity for Public Comment*, 38 F.E.R.C. (CCH) ¶ 61,230 at 61,725 (1987).

33. UNITED describes these settlements in its Petition at 7, n.6. The FERC acknowledged without complaint UNITED's $112 million settlement with another electric utility in its Opinion No. 237. (Pet. App. E at 123a).

In the same footnote UNITED describes as "currently pending" a suit for breach of contract by Mississippi Power Company. While it may be true that the case has not been formally dismissed, recent inquiry at the United States District Court for the Southern District of Mississippi reveals that the last action of any party was July 11, 1977 and on January 21, 1985, the court entered a minute entry stating in part ". . . [T]here appears to be no further reason at this time to maintain file as an open one for statistical purposes." *Mississippi Power Co. v. United Gas Pipe Line Co.*, No S74-258 (L) (S.D. Miss.) (Resp. App. A at 1a).

34. The FERC considered disputed tariff provisions for Transcontinental Gas Pipe Line Corporation (Transco) in Opinion No. 248, *Transcontinental Gas Pipe Line Corp.*, 35 F.E.R.C. (CCH) ¶61,043 (1986) and Opinion No. 248-A, *Transcontinental Gas Pipe Line Corp.*, 35 F.E.R.C. (CCH) ¶ 61,340 (1986). A federal jury had found Transco liable for breach of contract and, on appeal, the United States Court of Appeals, Fourth Circuit, stayed the proceeding and referred certain issues to the FERC. *CF Industries, Inc. v. Transcontinental Gas Pipe Line Corp.*, 614 F.2d 33 (4th Cir. 1980). Transco, joined by UNITED as intervenor, urged the FERC to "adopt a uniform Federal standard

Further, the natural gas pipeline industry has fundamentally changed. Long-term industrial contracts, such as those between LP&L and UNITED, are relics of the past; UNITED's last contract with LP&L was entered into in 1968 and expired December 31, 1987. Natural gas prices were partially deregulated, and the possible disparity of supplies available to interstate and intrastate markets was largely eliminated by the passage of the Natural Gas Policy Act in 1978.[35] A fundamental shift in the nature of the business of interstate pipeline companies has occurred as the FERC has sought to "unbundle" the services traditionally rendered by pipeline

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34. (continued)

of prudent pipeline management" but the FERC declared that these were "new versions of arguments rejected in Opinion No. 237." 35 F.E.R.C. at 61,781-2.

The proceeding referenced at page 17, n.18, of UNITED's petition was Transco's and UNITED's Petitions for Review of FERC Order Nos. 248 and 248-A which were dismissed in an unpublished memorandum opinion. *Transcontinental Gas Pipe Line Corp. v. FERC*, No. 86-1358 (D.C. Cir., order entered Feb. 16, 1988, order on rehearing entered April 22, 1988) (Resp. App. B at 6a). UNITED's reference to this proceeding suggests this order supports its argument here; to the contrary, the Court stated:

> "Accordingly, we uphold the Commission's determination that where the pipeline is itself at fault for causing the shortage of gas, whether through negligence or greater misconduct, trial courts are not precluded from holding the pipeline liable."

When the case returned to the Fourth Circuit, it was settled and dismissed on the joint agreement of the parties. *CF Industries, Inc. v. Transcontinental Gas Pipe Line Corp.*, No. 79-1366 (4th Cir., order entered June 23, 1988) (Resp. App. C at 18a).

35. 15 U.S.C. § 3301 *et seq.*

companies.[36] Interstate pipeline companies, including UNITED, are now primarily transporters, not sellers, of natural gas.[37]

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36. The FERC has identified three orders as part of the "unbundling of natural gas services which the Commission has endeavored to foster." *Notice of Issuance of Proposed Policy Statement and Opportunity for Public Comment*, 38 F.E.R.C. (CCH) ¶ 61,230 at 61,726 (1987). These orders are Order No. 380, FERC Statutes and Regulations, Regulations Preambles 1982-1985 (CCH) ¶ 30,571 (1984) (elimination of variable cost minimum bills), *aff'd in part and remanded in part sub nom. Wisconsin Gas Co. v. FERC*, 770 F.2d 1144 (D.C. Cir. 1985), *cert. denied*, 106 S.Ct. 1968, 1969; Order No. 436 FERC Statutes and Regulations, Regulations Preambles 1982-1985 (CCH) ¶ 30,665 (1985) (open access transportation), *vacated and remanded sub nom. Associated Gas Distrib. v. FERC*, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied*, 108 S.Ct. 1468, 1469 (1988); and Order No. 451, FERC statutes and Regulations (CCH) ¶ 30,701 (1986) (revised price structure for old gas), *appeal pending sub nom. Mobil Oil & Exploration Co. v. FERC*, No. 86-4940 (5th Cir.). *See also*, Order No. 500, FERC Statutes and Regulations (CCH) ¶ 30,761 (1987), *appeal pending sub nom. American Gas Assoc. v. FERC*, No. 87-1588, *et al.* (D.C. Cir.).

37. Since the passage of the Natural Gas Policy Act in 1978, transportation has been an ever increasing part of the business of interstate pipeline companies. According to the most recent Department of Energy statistics, in 1986 "major pipeline companies" delivered a total of 29,493,295 mmcf of gas of which 7,816,259 mmcf (27%) were sales and 9,619,897 mmcf (33%) were transported for others. In 1979, total deliveries were 31,198,565 mmcf with sales accounting for 15,087,895 mmcf (48%) and transportation 4,284,521 mmcf (14%). Department of Energy, Energy Information Administration. *Statistics of Interstate Natural Gas Pipeline Companies 1986* at 56-7. At trial, UNITED's president testified that UNITED then earned little revenue from selling transportation services (R., Tr. 27518).

On Oct. 2, 1987, United Gas Pipe Line Company applied for a "blanket, self-implementing certificate authorizing the open-access transportation of natural gas for interstate pipelines and other shippers" which was granted by the FERC on January 15, 1988. *United Gas Pipe Line Company*, 42 F.E.R.C. (CCH) ¶ 62,027 at 63,062 (1988).

Review of this case will not resolve any important question of law and policy; instead, it would be a simple review of the facts from a voluminous record to determine if the state courts were in error when they found that "the unrealized expectations and imprudent decisions of United and its management" were the causes of UNITED's failure to deliver to LP&L. This case *is* only of historical interest; curtailments are a decade past, and it was UNITED's performance in the 1960's and earlier that was scrutinized.[38] The evidentiary record UNITED asks this Court to review has been closed for over four years.

II. Federal and State Interests Are Not in Conflict

Although UNITED seeks to use federal regulation for its own purposes, it concedes, as it must, that "[s]ome regulation of interstate pipeline activities under state law is also contemplated under the NGA . . ." (Pet. at 3). In rejecting UNITED's attack of FERC Opinion Nos. 237 and 237-A, the Fifth Circuit noted:

> "First, the federal regulations are not comprehensive. Although the Natural Gas Act and the Natural Gas Policy Act regulate much of the natural gas industry, 'the federal scheme of regulation . . . is limited in its displacement of state regulatory authority.'
>
> "Second, the federal interest is to protect the federal curtailment scheme. Hence, the Commission determined that the public

38. **At trial, UNITED actually attempted to trace its difficulties to this Court's 1954 decision in *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, finding FPC jurisdiction over the price of gas at the wellhead.**

interest required the abrogation of contract liability based solely on compliance with a filed curtailment plan, but did not require exculpation when a pipeline causes the shortage by negligence or wrongful misconduct. That is, the Commission determined that the public interest required exculpation only when the basis for contract liability directly conflicts with the federal curtailment plan, but no more. The Commission's determination of the public interest is rational and adequately supported by reasons and findings."[39]

39. Pet. App. G at 177a-178a (Citation omitted).

The Court relied on its analysis in *Pennzoil Co. v. FERC*, 645 F.2d 360 (5th Cir. 1981), *cert. denied*, 454 U.S. 1142 (1982), in which it held that variations in the states' contract laws must be observed in the application of a FERC order to "area rate clauses" in producer-pipeline supply contracts. *Id.* at 383-84.

This Court has held in many contexts that state and federal law schemes have application under the Natural Gas Act. In *Federal Power Commission v. Louisiana Power & Light Co., supra* at 631, this Court cited its decision in *Panhandle Eastern Pipe Line Co. v. Public Service Commission*, 332 U.S. 507(1947) and noted, "Congress 'meant to create a comprehensive and effective regulatory scheme' . . . of dual state and federal authority." The "*Mobile-Sierra* doctrine" enunciated by this Court makes clear that the Natural Gas Act is not authority for the unnecessary abrogation of contracts governed by state law. *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956). Further, it is well-established that natural gas contract disputes do not arise under the Natural Gas Act such that federal question jurisdiction would lie in federal courts. *Phillips Petroleum Co. v. Texaco, Inc.*, 415 U.S. 125 (1974); *Pan American Petroleum Co. v. Superior Court of Delaware*, 366 U.S. 656 (1961); *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950).

Further, in a holding that completely refutes UNITED's position here, the Fifth Circuit answered UNITED's demand for a "uniform federal standard of liability" by declaring that the FERC had created such a standard: contract fault drawn from the states' laws of negligence and fault.[40] The Louisiana state courts heard all the evidence and every argument the parties could muster concerning UNITED's conduct and made reasonable factual determinations that UNITED's shortage was caused by UNITED's own mismanagement. The "uniform federal standard of liability" was met.

Contrary to the picture UNITED attempts to paint of a "potentially more sympathetic state court" (Pet. at 16) challenging federal interests, the Louisiana courts here recognized and gave full weight to UNITED's FERC tariff and the FERC's views as expressed in Opinion Nos. 237 and 237-A.[41] When fairly read, both the District Court's Reasons for Judgment[42] and the Louisiana Court of Appeal's

40. Pet. App. G at 180a-185a.

41. While expressing "no opinion about the case," the Fifth Circuit stated that "United may have legitimate concerns" about the state court's treatment of federal interests. (Pet. App. G at 181a-182a, n.15). In its petition, at 13-14, UNITED alters this to claim that "the Fifth Circuit acknowledged that United had 'legitimate concerns' about the Louisiana courts' failure, up to that time, to honor the standard established by the Commission." In addition to paraphrasing unfairly the Court, UNITED ignores the fact that "up to that time" it argued to the Louisiana courts that Opinion No. 237 was in error. *See*, n.23, 24, *supra.*

42. UNITED asserts (Pet. at 9): "The trial court ruled that the sole issue presented was whether United's curtailments breached its delivery obligation." App. C at 84a is offered as a citation but at that page the Court actually referred to "the ultimate issue." The following pages of the District Court's opinion clearly show its consideration of the imprudence of UNITED's actions leading to its breaches of contract.

opinion fully comply with the standards of liability established by the FERC and upheld by the Fifth Circuit over UNITED's challenge. Ultimately, UNITED's complaint is merely that the Louisiana Court of Appeal, after considering UNITED's contention that FERC Opinion No. 237 was wrong, and after issuing a comprehensive opinion on this massive contract dispute, should have issued a second opinion on rehearing after the Fifth Circuit rejected UNITED's attack on Opinion No. 237. The Louisiana Court of Appeal had no obligation to do this, especially since its opinion fully acknowledged the federal interest as determined by the FERC and as expressed in UNITED's tariffs. The Louisiana Court of Appeal certainly considered the Fifth Circuit opinion since United extensively argued for a rehearing based upon it, but the Court of Appeal apparently found it presented nothing new or nothing that would change the result.[43]

Similarly, the Supreme Court of Louisiana had no obligation to grant UNITED's application to it for writs and its refusal to do so is not reviewable by this Court.[44] The

43. The result in the Fifth Circuit was a denial of UNITED's Petition for Review of FERC Opinion Nos. 237 and 237-A which UNITED had told the Louisiana Court of Appeal were in error. UNITED gained no rights from its defeat and there was no change in the applicable law. Under Louisiana law, rehearing need not be granted to address even a correctly specified error if the result would not change. *Alleman v. Houston Fire & Casualty Insurance Co.*, 142 So.2d 846 (La. App. 1st Cir. 1962).

44. UNITED correctly styles its Petition as one for a "Writ of Certiorari to the Louisiana Court of Appeal, Fourth Circuit" but nevertheless makes an unwarranted attack on the Louisiana Supreme Court (Pet. at 14).

UNITED complains (Pet. at 16, n.17) that LP&L argued to the Louisiana Supreme Court that "This Court Is Not Bound By The Fifth

Louisiana Supreme Court also had the Fifth Circuit opinion before it and there is no basis in logic or fact for UNITED's speculation that the Louisiana Supreme Court rejected that opinion; a more reasonable conclusion is that it found the lower state courts' decisions to be entirely consistent with the federal court decision.

UNITED's ponderous attempt to create an issue worthy of review by suggesting that exclusive statutory provisions for review of FERC orders were challenged (Pet. at 13-17) should be dismissed as frivolous. UNITED cannot point to a single word in the opinions issued by the Louisiana courts on this matter that is remotely a challenge to the Federal Energy Regulatory Commission's Opinion Nos. 237 and 237-A, or the decision of the United States Court of Appeals for the Fifth Circuit. At best, UNITED can claim disappointment, but not a federal question worthy of review by this Court, over the refusal of the Louisiana Court of Appeal to reconsider the case after UNITED's sudden adoption of Opinion No. 237 subsequent to the Fifth Circuit's rejection of UNITED's attack on that opinion, or because the Louisiana Supreme Court did not grant its application for writs.

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44. (continued)

Circuit Opinion." United had erroneously argued the contrary from a 1931 Louisiana Supreme Court decision that was no longer the law. Louisiana law is that United States Supreme Court decisions on federal issues are binding authority, but lower federal court decisions are merely persuasive. *See, e.g., State v. Selman*, 300 So.2d 467 (La. 1974).

LP&L's principal argument to the Louisiana Supreme Court was that the judgment below was consistent with the Fifth Circuit opinion and that UNITED misread the Fifth Circuit opinion, but if UNITED were right, the Fifth Circuit must have overstated the case and Opinion No. 237 should be followed, not the Fifth Circuit. LP&L would make the same argument to this Court.

The state court opinions are not a challenge to any federal agency order; they are, instead, a model application of federal tariffs to a state law contract dispute with complete deference being given to the agency's orders as affirmed on appeal. UNITED's argument is really a suggestion that this Court should monitor every application of an agency rule after it has been properly reviewed. Certiorari should not be granted for such an impossible endeavor.

In a further effort to show conflict where none exists, UNITED claims that some of the actual findings of its imprudent conduct made by the state courts conflict with unspecified previous actions of the FERC. Thus, it argues that "some" of the additional sales and "most" of the released reserves found by the state courts to be imprudently made were "authorized by the Commission."[45] The FERC itself rejected similar arguments when made by UNITED in the *Transco* case, holding that such findings by trial courts did not constitute a collateral attack on its orders and pointing out that the FPC had maintained a "policy of relying on pipeline management to maintain adequate reserves."[46]

UNITED repeatedly focuses on the reference by the Louisiana Court of Appeal to "implied obligations to have and maintain, or to acquire, at whatever cost, the gas necessary to fulfill the explicit delivery obligations."[47] UNITED suggests that its breach of such obligations cannot be proof of negligence or imprudence since interstate pipelines also

45. Pet. at 24, n.27.

46. Opinion No. 248-A, *Transcontinental Gas Pipe Line Corp.*, 35 F.E.R.C. (CCH) ¶61,340 at 61,782 (1986). *See also, United Gas Pipe Line Co., Initial Decision, supra*, at 65,292.

47. Pet. App. A at 9a, discussed by UNITED, Pet. at 11 and 21-3.

have obligations not to "unduly increase costs to customers." (Pet. at 23).

UNITED's emphasis is misplaced. First, this is but one of many imprudent acts the state courts found,[48] and, secondly, the Court of Appeal points to these obligations to obtain supply in its analysis of defenses raised by UNITED under Louisiana contract law. Moreover, it *was* imprudent for a pipeline to enter into firm, non-jurisdictional contracts, to which its curtailment tariff did not then apply, while releasing old reserves and not acquiring at any level of cost, let alone "whatever cost," new and needed reserves.[49] UNITED's principal contract with LP&L was entered into on May 6, 1968, for a twenty-year firm supply of natural gas for a new generating unit contemplated to be in operation on January 1, 1971, but UNITED announced on October 26, 1970 that it did not have a sufficient supply and would be unable to perform. Surely, the state courts reasonably found imprudence by UNITED in these facts.

In an attempt to gain partial victory, UNITED repeatedly argues (Pet. at 10, n.10; 15, n.15; 24-25) that its curtailments

48. Elsewhere the Court of Appeal noted: "The trial judge's factual conclusion, reasonably supported by the record, was that by the exercise of due diligence, in not releasing reserves, in acquiring reserves when it could have done so, and in not committing itself to further deliveries by added sales atop its preexisting contractual obligations, United could have prevented the shortage that its own actions caused." Pet. App. A at 16a.

49. The FERC administrative law judge had found "[I]t is significant that during the 1960's United was the only pipeline company that released reserves. What is particularly disturbing is that the Company, according to its witnesses, gave up the reserves without even studying the impact of the loss on United's supply situation." *United Gas Pipe Line Co., Initial Decision, supra*, at 65,297.

subsequent to FPC Opinion No. 647 should be distinguished from its other curtailments because LP&L thereafter was placed in a lower priority and received less gas than before from UNITED. The state courts fully considered UNITED's argument and found it erroneous. The District Court found:

> "As part of a series of curtailment plans, the FPC placed deliveries of power plant gas in a fourth or lowest category of priority. United contends that this action of the FPC exonerates it from liability for any increased fuel cost. Opinion 647 of January 12, 1973 (49 FPC 179) was issued in Docket RP 71-29, a proceeding before the FPC initiated by United on October 26, 1970. The only reason for United's application was that it had developed a shortage of gas on its interstate system. It thus requested the FPC to allocate deliveries of its remaining inadequate gas supplies between its customers pursuant to a curtailment proposal included in its application. Subsequently, during the ensuing decade, a number of different plans were submitted by United for approval by the FPC. The FPC thereafter issued a series of orders allocating United's available gas supplies. Such orders were entered after vigorous participation in the proceedings by United and others. All such orders were appealed to the United States Fifth Circuit Court of Appeal, which ultimately held that the plans approved by the FPC were unlawful and not in the public interest; accordingly the Court remanded the proceedings to the FPC. Hence, Order 647 is but one in a series of orders the FPC issued as a direct result of United's

shortage on its interstate system and application for governmental intervention. That order, too, was vacated in *State of Louisiana v. FPC*, 503 F.2d 844 (5th Cir. 1974) over the opposition of United.

"The Court is of the opinion that *the shortage is the cause of the damages, not the action of the FPC in trying to deal with the results of United's shortage. The curtailment orders did not cause the shortage, United's imprudent management decisions caused its shortage*. United's failure to deliver the contract volumes is not attributable to the FPC's curtailment plans proposed and supported by United. Its failure is due to a shortage of gas on its systems which United could have avoided by the exercise of due diligence."[50]

The FERC, in another curtailment case, used similar logic in allowing liability where a negligently created shortage caused resort to an FPC-approved curtailment plan:

"As indicated in Opinion No. 248, recovery of damages for breach of contract (or other contract-based cause of action, such as promissory estoppel) arising out of curtailment will be prevented by a pipeline's adherence to an approved curtailment plan in administering curtailments, *unless there is a showing of negligence or misfeasance in causing the*

50. Pet. App. C at 96a-97a (emphasis added). The Louisiana Court of Appeal also rejected these contentions. Pet. App. A at 20a-21a.

shortages that result in having to resort to use of the curtailment plan."[51]

It was UNITED's self-induced shortage that caused LP&L's damages and not the efforts of the FPC to deal with the emergency presented to it by UNITED.

UNITED concludes its Petition by claiming it "cannot serve two masters," and that the FERC cannot be "at war with various state bodies or courts."[52] There is no war and, yes, UNITED must serve two masters. It must manage its affairs prudently in accordance with both federal and state law schemes. As the Fifth Circuit explained:

> "[U]niformity of result is needed only to protect the federal interest, that is, only to exculpate United from contract liability in all cases not based on United's fault. Uniformity of exculpation beyond those cases is not a matter of federal concern, for liability then does not create incentives for United to resist a federal curtailment scheme. Rather, liability flows only from United's mismanagement in causing the shortage of gas, creating incentives for United to manage properly its gas supply and demand."[53]

The state courts found such mismanagement and UNITED's liability is not a matter of federal concern.

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51. Opinion No. 248-A, *Transcontinental Gas Pipe Line Corp.*, 35 F.E.R.C. (CCH) ¶ 61,340 at 61,783 (1986) (footnotes omitted, emphasis added).

52. Pet. at 26.

53. Pet. App. G at 180a.

CONCLUSION

For all of these reasons the petition should be denied.

Respectfully submitted,

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September 27, 1988

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

CIVIL ACTION NO. S74-0258(N)

MISSISSIPPI POWER COMPANY

PLAINTIFF

VS.

UNITED GAS PIPE LINE COMPANY
AND PENNZOIL COMPANY

DEFENDANTS

MISSISSIPPI PUBLIC SERVICE COMMISSION
(INTERVENOR)

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
JAN 21 1985
CLARENCE A. PIERCE, CLERK
BY ________________ DEPUTY
(stamp)

MINUTE ENTRY ORDER

This case having been pending for over three years, all presently contemplated proceedings having been completed, and there having been no action herein for over 12 months, there appears to be no further reason at this time to maintain the file as an open one for statistical purposes, and the Clerk is instructed to submit a JS-6 form to the Administrative Office.

Nothing contained in this minute entry shall be considered a dismissal or disposition of this matter, and should further proceedings in it become necessary or desirable, any party may initiate it in the same manner as if this minute entry had not been entered.

SO ORDERED this the 21st day of January, 1985.

s/s Walter L. Nixon, Jr.
UNITED STATES DISTRICT JUDGE

A TRUE COPY OF A CERTIFIED COPY, I DO HEREBY CERTIFY,
CLARENCE A PIERCE, CLERK
By: s/s M. Marie

A TRUE COPY, I HEREBY CERTIFY.
Clarence A. Pierce, CLERK
BY:
s/s **D. Floyd**
Deputy Clerk
(stamp)

APPENDIX B

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
UNITED STATES COURTHOUSE
333 CONSTITUTION AVENUE, N.W.
WASHINGTON, D. C. 2001-2856**

CONSTANCE L. DUPRE'	GENERAL INFORMATION
CLERK	(202) 535-3300

February 16, 1988

RE: 86-1358 - Transcontinental Gas Pipe Line Corporation v. FERC

Dear Counsel:

I am enclosing herewith a copy of the judgment of this Court entered today in the above entitled case.

Sincerely,

s/s Denise C. Thomas
Denise C. Thomas
Opinions Clerk

enclosure

DISTRIBUTION:

Christopher T. Boland, Esquire	James R. Lacey, Esquire
David E. Varner, Esquire	Peter J. Levin, Esquire
Thomas F. Ryan, Jr., Esquire	Gregory Grady, Esquire
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Stephen A. Herman, Esquire	Morton L. Simons, Esquire
John E. Cheatham, III, Esquire	Glenn W. Letham, Esquire

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-1358 September Term, 1987

Transcontinental Gas Pipe Line Corporation,
Petitioner

v.

Federal Energy Regulatory Commission,
Respondent

CF Industries, Inc., et al.,
Interstate Natural Gas Association of America,
Public Service Electric and Gas Company,
United Gas Pipeline Company,
Public Service Company of North Carolina, Inc.,
North Carolina Utilities Commission,
Pennsylvania Gas and Water Company,
Intervenors

United States Court of Appeals
For the District of Columbia Circuit
FILED FEB 16 1988
CONSTANCE L. DUPRE'
CLERK
(stamp)

PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL ENERGY REGULATORY COMMISSION

Before: RUTH B. GINSBURG, BUCKLEY and SENTELLE
Circuit Judges.

JUDGMENT

This petition for review was heard on the record from the Federal Energy Regulatory Commission and was briefed and argued by counsel for the parties. The court has considered the issues presented and concludes that the petition occasions no need for a published opinion. *See* D.C. Cir. R. 14(c). For the reasons stated in the accompanying memorandum, it is

ORDERED and ADJUDGED, by the Court, that the orders of the Commission, to the limited extent indicated in the accompanying memorandum, be affirmed, and that all other issues remain open for adjudication in the proceeding now pending in the Fourth Circuit. It is

FURTHER ORDERED, by the Court, *sua sponte*, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. R. 15 (August 1, 1987). This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

Per Curiam
For The Court

s/s Constance L. Dupre
Constance L. Dupre
Clerk

(stamp)

No. 86-1358- **Transcontinental Gas Pipe Line Corp. v. FERC**

MEMORANDUM

To the extent that it addresses the issues presented here, we adopt as our own the well-reasoned position set forth in *United Gas Pipe Line Co. v. FERC*, 824 F.2d 417, 425-30 (5th Cir. 1987). Accordingly, we uphold the Commission's determination that where the pipeline is itself at fault for causing the shortage of gas, whether through negligence or greater misconduct, trial courts are not precluded from holding the pipeline liable.

In our view, all other issues Transco raises, including the meaning and effect of its certificates of public convenience and necessity, are most intelligently resolved in a case-specific context. As the Commission cogently argued in its brief to this court, those other issues are appropriately reserved for consideration and decision in the Fourth Circuit, as the court authorized to review the judgment for damages entered on the jury's verdict by the federal district court in North Carolina.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-1358 September Term, 1987

Transcontinental Gas Pipe Line Corporation,
Petitioner

v.

Federal Energy Regulatory Commission,
Respondent

CF Industries, Inc., et al.,
Intervenors

United States Court of Appeals
For the District of Columbia Circuit
FILED APR 22 1988
CONSTANCE L. DUPRE'
CLERK
(stamp)

BEFORE: Ruth B. Ginsburg, Buckley and Sentelle,
Circuit Judges

ORDER

Upon consideration of the Motion of Petitioner for Rehearing it is

ORDERED, by the Court, that the petition is denied in part and granted in part, as stated in the attached memorandum.

FOR THE COURT:

CONSTANCE L. DUPRE, CLERK

BY: s/s Robert A. Bonner
Robert A. Bonner
Deputy Clerk

No. 86-1358, Transcontinental Gas Pipe Line Corporation v. FERC

MEMORANDUM

In a motion for rehearing filed April 1, 1988, Transco asks us to rule dispositively on "the meaning and effect of [its] certificates of public convenience and necessity." Alternately, Transco requests "clarification of the effect of [our] February 16, 1988 rulings." We deny Transco's first request and grant its alternate plea for clarification to the limited extent stated herein.

In our February 16, 1988 disposition, we specifically upheld "the Commission's determination that where the pipeline is itself at fault for causing the shortage of gas, whether through negligence or greater misconduct, trial courts are not precluded from holding the pipeline liable." We so ruled based on *United Gas Pipe Line Co. v. FERC*, 824 F.2d 417, 425-30 (5th Cir. 1987). All further matters, we stated, "are appropriately reserved for consideration and decision in the Fourth Circuit, as the court authorized to review the judgment for damages entered on the jury's verdict by the federal district court in North Carolina." We adhere to that view.

In leaving the dispositive ruling on "the certificate issue" for Fourth Circuit adjudication in a case-specific context, we are mindful that the Commission distinguished the matter on which its predecessor (the FPC) ruled and the situation before the district court. *See Transcontinental Gas Pipe Line Corp.*, 35 F.E.R.C. ¶ 61,340, at 61,782-83 (June 16, 1986) (Order No. 248-A) (certificates granted on the basis of Transco's gas deliverability *at that time* plus anticipation that Transco, through "intensified efforts," would *in the future* successfully develop gas supplies).

Transco's understanding of our decision is correct, we clarify, to this extent: we fully intend that the Fourth Circuit "have the task of evaluating the aspects of the Commission's Opinions not reviewed by this Court." When it referred "the certificate issue" to the Commission, the Fourth Circuit observed: "After we have had the benefit of the Commission's decision . . . , we will be in a better position to consider these appeals and determine the proper procedure for reviewing the Commission's findings as well as their effect upon the pending litigation." *CF Industries v. Transcontinental Gas Pipe Line Corp.*, 614 F.2d 33, 36 (4th Cir. 1980). We leave the way clear for our sister court to proceed unencumbered by further advice disembodied from the case before it; as stated in our February 16 Judgment, all issues not passed on by this court remain open for adjudication in the proceeding now pending in the Fourth Circuit.

APPENDIX C

ANDREWS & KURTH
ATTORNEYS
TEXAS COMMERCE TOWER
HOUSTON, TEXAS 77002

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FILED
JUN 17 9:58 AM '88
U.S. COURT OF APPEALS
FOURTH CIRCUIT
(stamp)

June 16, 1988

BY FEDERAL EXPRESS

Mr. John M. Greacen, Clerk
United States Court of Appeals
for the Fourth Circuit
United States Courthouse
Tenth and Main Streets
Richmond, Virginia 23219

Re: Case Nos. 79-1359 and 79-1366; CF Industries, Inc. and Farmers Chemical Association, Inc. v. Transcontinental Gas Pipe Line Corporation

Dear Mr. Greacen:

The above-referenced litigation has been compromised and settled. Enclosed is a "Joint Agreement to Dismiss" in which CF Industries, Inc., Farmers Chemical Association, Inc., and Transcontinental Gas Pipe Line Corporation request that the pending appeals be dismissed pursuant to Rule 42(b) of the Federal Rules of Appellate Procedure.

A copy of the Joint Agreement has been served on all counsel of record.

Thank you for your long-continuing assistance in this matter.

Very truly yours,

s/s Priscilla R. Owen

Priscilla R. Owen

160/jd

cc: All Counsel of Record (w/encs.)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-1359
Consolidated with
No. 79-1366

CF INDUSTRIES, INC., and
FARMERS CHEMICAL
ASSOCIATION, INC.,

v.

TRANSCONTINENTAL GAS
PIPELINE CORPORATION

FILED
JUN 17 9:58 AM '88
U.S. COURT OF APPEALS
FOURTH CIRCUIT
(stamp)

JOINT AGREEMENT TO DISMISS

Pursuant to Rule 42(b) of the Federal Rules of Appellate Procedure, CF Industries, Inc., and Farmers Chemical Association, Inc., Appellants and Appellees, and Transcontinental Gas Pipe Line Corporation, Appellant and Appellees, have agreed that the appeals pending herein should be dismissed, and that each party shall bear its own costs and any fees incurred by it.

WHEREFORE, the parties jointly request that these appeals be dismissed.

Respectfully submitted,

CF INDUSTRIES, INC., and
FARMERS CHEMICAL ASSOCIATION, INC.

BY: s/s E. Osborne Ayscue, Jr.
E. Osborne Ayscue, Jr.

OF COUNSEL:

SMITH HELMS MULLISS & MOORE
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Post Office Box 31247
Charlotte, NC 28231

Stephen A. Herman
Kirkland & Ellis
655 15th St. N.W. - Suite 1200
Washington, D.C. 20005

COUNSEL FOR
CF INDUSTRIES, INC. and
FARMERS CHEMICAL ASSOCIATION, INC.

A True Copy: Teste:
John R. Greacen, Clerk
By s/s Cheryl Hughes
Deputy Clerk
(stamp)

TRANSCONTINENTAL GAS PIPE
LINE CORPORATION

By: s/s Alfred H. Ebert, Jr.
Alfred H. Ebert, Jr.

OF COUNSEL:

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Andrews & Kurth
4200 Texas Commerce Tower
Houston, Texas 77002

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Hunton & Williams
Post Office Box 1535
Richmond, VA 23212

David E. Varner
Transcontinental Gas Pipe Line
Corporation
P.O. Box 1369
Houston, Texas 77251

Counsel for Transcontinental
Gas Pipe Line Corporation

A True Copy: Teste:
John M. Greacen, Clerk
By s/s Cheryl Hughes
Deputy Clerk
(stamp)

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 79-1359

CF Industries, Inc. and Farmers
Chemical Association, Inc.,

Appellants,

v.

Transcontinental Gas Pipe
Line Corporation,

Appellee,

State of North Carolina,

Amicus Curiae,

Federal Energy Regulatory Commission,

Amicus Curiae,

Interstate Natural Gas Association
of America,

Amicus Curiae.

FILED
JUN 23 1988
U.S. Court of Appeals
Fourth Circuit
(stamp)

No. 79-1366

CF Industries, Inc. and Farmers
Chemical Association, Inc.,

Appellees,

v.

Transcontinental Gas Pipe
Line Corporation,

Appellant,

State of North Carolina,

Amicus Curiae,

Federal Energy Regulatory Commission,

Amicus Curiae,

Interstate Natural Gas Association
of America,

Amicus Curiae.

Appeals from the United States District Court for the Western District of North Carolina, at Charlotte. James B. McMillan, District Judge.

Upon consideration of the joint agreement to dismiss,

IT IS ORDERED that these appeals are dismissed pursuant to Rule 42(b) of the Federal Rules of Appellate Procedure, with each party to bear its own costs and any fees incurred by it.

For the Court

s/s John M. Greacen
CLERK

A True Copy: Teste:
John M. Greacen, Clerk
By s/s Cheryl Hughes
Deputy Clerk
(stamp)

(7)

No. 88-191

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

UNITED GAS PIPE LINE COMPANY,
Petitioner,

v.

LOUISIANA POWER & LIGHT COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Louisiana Court of Appeal, Fourth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

JOHN H. CHEATHAM, III
Counsel of Record
1660 L Street, N.W.
Washington, D.C. 20036
(202) 293-5770
Attorney for Interstate Natural Gas Association of America

September 27, 1988

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-191

UNITED GAS PIPE LINE COMPANY,
Petitioner,

v.

LOUISIANA POWER & LIGHT COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Louisiana Court of Appeal, Fourth Circuit

---

MOTION OF INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

The Interstate Natural Gas Association of America ("INGAA") hereby moves for leave to file the accompanying brief amicus curiae in the captioned matter. This motion is being filed in compliance with the Court's Rule 36. INGAA sought the consent of the parties to file a brief amicus curiae in support of the petition for a writ of certiorari filed by United Gas Pipe Line Company ("United"). United has provided its consent and a copy of that consent has been filed with the Clerk. Despite the industrywide importance of this case the Respondents Louisiana Power & Light Company, the City of New Orleans, and the Louisiana Public Service Commission, declined to give their consent.

INTEREST OF THE AMICUS CURIAE

INGAA is a nonprofit national association representing virtually all of the major interstate natural gas transmission companies operating in the United States.* INGAA's members account for over 90 percent of all natural gas transported and sold for resale in interstate commerce, and they are subject to the jurisdiction of the Federal Energy Regulatory Commission under various provisions of the Natural Gas Act, 15 U.S.C. §§ 717-717z (1982 & Supp. IV 1986) ("NGA"); the Department of Energy Organization Act, 42 U.S.C. §§ 7101-7375 (1982 & Supp. IV 1986); and the Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301-3432 (1982 & Supp. IV 1986). INGAA's membership also includes three Canadian interprovincial pipelines categorized as Group I pipelines by the National Energy Board of Canada.

This case arose out of the severe natural gas shortfall that confronted the entire country in the 1970's. Demand outpaced supply and necessitated action by the Federal Power Commission and its successor agency, the Federal Energy Regulatory Commission (both hereinafter "Commission"). The Commission, acting under its plenary authority to regulate curtailments, *see Federal Power Comm'n v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972), responded to the severe shortfall with numerous industrywide orders, including orders directing natural gas pipelines to curtail deliveries in accordance with a set of curtailment priorities based on gas usage, *i.e.*, "end-use" curtailment priorities. *See* Order No. 431, 45 F.P.C. 570 (1971); Order Nos. 467, 49 F.P.C. 85 (1973) and 467-B, 49 F.P.C. 583 (1973). Petitioner and virtually all other pipelines were required to file tariffs with the Commission reflecting these curtailment priorities, which were to be implemented irrespective of conflicting contractual provisions.

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* See Appendix, *infra*, for a list of INGAA members.

In carrying out curtailments under these filed tariffs, interstate pipelines believed that such compliance would provide reasonable protection for them against claims for contractual damages arising out of curtailments. In a proceeding involving United, the Commission confirmed this expectation by holding that United's compliance with its curtailment tariffs exonerated it from liability unless the curtailments had been caused by its own "negligence or willful misconduct." *United Gas Pipe Line Co.*, 35 F.E.R.C. ¶ 61,344, at 61,786 (1986). On review under the NGA, the United States Court of Appeals for the Fifth Circuit affirmed this standard of liability, emphasizing that the negligence requirement was a federal standard incorporating specific (albeit commonly understood) elements. *United Gas Pipe Line Co. v. Federal Energy Regulatory Comm'n*, 824 F.2d 417 (5th Cir. 1987). Upon the Fifth Circuit's affirmation, the Commission's decision became final.

In the meantime, the Louisiana Court of Appeal, in a breach of contract case arising from United's curtailments, had imposed upon United a $180 million judgment without regard to the federal negligence standard. After the Commission's order became final, the Louisiana Court of Appeal and then the Supreme Court of Louisiana were requested to reconsider the imposition of liability in light of the federal negligence standard. On each occasion the Louisiana courts declined to do so without explanation.

The Louisiana Court of Appeal decision is of substantial concern to natural gas transmission companies because it creates uncertainties regarding the efficacy of federal regulatory orders and because it establishes standards for the rendering of natural gas service that conflict with those mandated by the NGA. In short, it creates an egregious conflict between state and federal law.

In this regard, the Commission order holding that United's curtailment liability was limited to curtailments shown to have been caused by its own negligence or will-

ful misconduct became final and non-appealable under the NGA. Yet the Louisiana courts have ignored that order and have held the pipeline liable under a broader standard that falls short of the federal standard.

The uncertainty created over the validity of final agency action is particularly disquieting here because it opens to question whether pipeline curtailment tariffs, which reflect Commission curtailment policies and orders, can be effectively implemented. The Commission has properly held that, to exercise its curtailment authority, pipelines complying with that authority must be exonerated from curtailment liability absent a showing of at least negligence. If state courts can impose liability without regard to this negligence requirement, the Commission's authority to insulate curtailing pipelines from unwarranted liability, and hence its authority to implement curtailments generally, will be undermined.

Moreover, the liability standards applied by the Louisiana Court of Appeal fundamentally conflict with a pipeline's service obligations under the NGA. The Louisiana Court of Appeal held that United's sales contracts in Louisiana obligated it to stockpile gas supplies *at any* cost in order to avoid liability for a subsequent shortfall—no matter how unforeseeable that shortfall might have been. This service obligation established by the Louisiana judiciary is in direct contrast to a pipeline's obligations under the NGA to provide adequate service at the lowest reasonable cost. Pipelines cannot adhere to both standards. The Louisiana decision has placed them in a genuine dilemma, which only this Court can resolve.

The participation of INGAA as amicus curiae will provide this Court with the views of the interstate natural gas pipeline industry and will thus broaden the Court's perspective as to the importance of this case to the national interest. No other party to this case is in a position to represent the views of the interstate pipeline industry.

WHEREFORE, for the reasons stated above, INGAA respectfully prays that this motion be granted and that this Court receive the attached brief amicus curiae for filing.

Respectfully submitted,

JOHN H. CHEATHAM, III
Counsel of Record
1660 L Street, N.W.
Washington, D.C. 20036
(202) 293-5770
Attorney for Interstate Natural Gas Association of America

September 27, 1988

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-191

UNITED GAS PIPE LINE COMPANY,
Petitioner,

v.

LOUISIANA POWER & LIGHT COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Louisiana Court of Appeal, Fourth Circuit

---

BRIEF OF INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

The Interstate Natural Gas Association of America ("INGAA") is filing this brief in support of the petition of United Gas Pipe Line Company ("United" or "Petitioner") for a writ of certiorari to review the April 30, 1987 judgment of the Court of Appeal of Louisiana, Fourth Circuit ("Louisiana Court of Appeal") in *City of New Orleans v. United Gas Pipe Line Co.*, 517 So. 2d 145 (La. Ct. App. 1987), reproduced as Pet. App. A.[1]

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[1] "Pet. App." refers to the Appendix to Petition for Writ of Certiorari filed by Petitioner on August 2, 1988.

INTEREST OF THE AMICUS CURIAE

INGAA is a nonprofit national association representing virtually all of the major interstate natural gas transmission companies operating in the United States and three inter-provincial Canadian pipelines categorized as Group I pipelines by the National Energy Board of Canada. INGAA's U.S. members account for over 90 percent of all natural gas transported and sold for resale in interstate commerce, and they are subject to the jurisdiction of the Federal Energy Regulatory Commission under various provisions of the Natural Gas Act, 15 U.S.C. §§ 717-717z (1982 & Supp. IV 1986) ("NGA"); the Department of Energy Organization Act, 42 U.S.C. §§ 7101-7375 (1982 & Supp. IV 1986); and the Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301-3432 (1982 & Supp. IV 1986). For the reasons set forth in the accompanying motion, the decision of the Louisiana Court of Appeal results in substantial prejudice to interstate natural gas pipelines.

ARGUMENTS IN SUPPORT OF PETITION

In enacting the NGA, the Congress of the United States declared that "[f]ederal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest." 15 U.S.C. § 717(a). To carry out this "federal regulation," Congress entrusted the Commission with the exclusive authority to regulate the interstate natural gas market. This Court has repeatedly affirmed the pervasiveness of the Commission's exclusive jurisdiction under the NGA and under the companion Federal Power Act, 16 U.S.C. §§ 791a-828c (1982 & Supp. IV 1986), also administered by the Commission.[2] The Com-

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[2] *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, —— U.S. ——, 108 S. Ct. 2428 (1988); *Schneidewind v. ANR Pipeline Co.*, —— U.S. ——, 108 S. Ct. 1145 (1988); *Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Bd.*, 474 U.S. 409 (1986); *Northern Natural Gas Co. v. State Corp. Comm'n*, 372 U.S. 84 (1963).

mission's exclusive authority "binds both state and federal courts and is in the former respect mandated by the Supremacy Clause [U.S. Constitution art. VI, cl. 2]." *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 108 S. Ct. at 2439. Interstate pipeline companies are similarly bound by final rulings of the Commission in conducting their business.

In *Federal Power Commission v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972) ("*FPC v. LP&L*"), this Court held that the Commission had exclusive authority to regulate curtailments instituted by interstate pipelines. Because curtailments by definition represent deliveries of less gas than a pipeline's customers would otherwise have received, curtailments raise questions of potential pipeline liability and, particularly, of the extent to which the Commission regulation precludes such liability. These questions, left open in *FPC v. LP&L*, were finally addressed in connection with Petitioner's curtailment proceedings in Commission Opinion No. 237, *United Gas Pipe Line Co.*, 31 F.E.R.C. ¶ 61,336 (1985), Pet. App. E at 115a, and in Opinion No. 237-A, *United Gas Pipe Line Co.*, 35 F.E.R.C. ¶ 61,344 (1986), Pet. App. F at 141a. The Commission held that Petitioner's compliance with its tariffs and Commission orders would exonerate it "from breach of contract claims, provided that the curtailments were not caused by its negligence or willful misconduct . . . ." Pet. App. F at 141a.[3] In so holding,

[3] Shortly after Opinion Nos. 237 and 237-A were issued, the Commission reached the same conclusion regarding another pipeline's potential liability for curtailments. *Transcontinental Gas Pipe Line Corp.*, Opinion No. 248, 35 F.E.R.C. ¶ 61,043, at 61,080 (1986) (claims that "arise because of curtailments initiated and conducted in accordance with effective curtailment tariffs are preempted by Federal law, which nullifies them. But claims that require a finding of 'negligence' to permit recovery remain unaffected.") On appeal, the United States Court of Appeals for the District of Columbia Circuit affirmed the Commission's limitation on liability, adopting "as our own the well-reasoned position set forth in *United Gas Pipe Line Co. v. FERC*, 824 F.2d 417, 425-30

the Commission concluded that permitting curtailment liability to be imposed upon Petitioner absent a showing of negligence would interfere with the Commission's curtailment jurisdiction by granting undue preferences to the litigants and by subjecting other curtailed customers to an undue prejudice. Pet. App. E at 131a-132a.

On appeal, the United States Court of Appeals for Fifth Circuit affirmed the Commission's adoption of a negligence standard for pipeline curtailment liability. *United Gas Pipe Line Co. v. Federal Energy Regulatory Comm'n,* 824 F.2d 417 (5th Cir. 1987) ("*United v. FERC*"); Pet. App. G at 161a. Moreover, the Fifth Circuit emphasized that the negligence standard not only preempted state laws imposing liability without culpability, but also preempted state laws imposing liability under "a standard of culpability less than negligence."

> Were a state to apply a standard of culpability less than negligence, that standard would directly conflict with the Commission's jurisdictional determination of the public interest and would be void under the supremacy clause, U.S. Const. art. VI, cl. 2.

Pet. App. G at 181a.

Prior to the Fifth Circuit's decision, the Louisiana Court of Appeal had held Petitioner liable for $180 million in damages for curtailments to a customer. *City of New Orleans v. United Gas Pipe Line Co.,* Pet. App. A. In rendering this judgment, the Louisiana court made no true finding of negligence. Rather, it found that Petitioner's pre-curtailment actions, "however reasonable in other contexts," nonetheless "did not constitute a reasonable effort to perform those contracts [with the plaintiff], especially in their implied obligations to have and maintain, or to acquire, at whatever cost, the gas necessary to fulfill the explicit delivery obligations." Pet. App. A

(5th Cir. 1987)." *Transcontinental Gas Pipe Line Corp. v. Federal Energy Regulatory Comm'n,* No. 86-1358 (D.C. Cir. Feb. 16, 1988), *reh'g denied in pertinent part* (Apr. 22, 1988).

at 9a. Even assuming *arguendo* that the Louisiana court applied some *state* standard of culpability in holding Petitioner liable, it clearly utilized a "standard of culpability less than negligence" and hence conflicts with the Commission's determination.

I. THE LOUISIANA COURTS' FAILURE TO APPLY THE FEDERAL STANDARD OF LIABILITY CREATES SUBSTANTIAL UNCERTAINTIES OVER THE VALIDITY OF FINAL COMMISSION ACTION AND THE EXCLUSIVENESS OF COMMISSION JURISDICTION.

The Louisiana courts' failure to adhere to the negligence standard adopted by the Commission creates troubling uncertainties for pipelines seeking to comply with their federal obligations. Limitations on liability are "an integral part of a proposed curtailment plan." *United v. FERC*, Pet. App. G at 175a, (quoting *Louisiana v. Federal Power Comm'n*, 503 F.2d 844, 867 (5th Cir. 1974)). In carrying out curtailments under the Commission's direction pursuant to filed tariffs, pipelines reasonably expected that their adherence to curtailment tariffs would not subject them to contract liability for curtailments. *See FPC v. LP&L*, 406 U.S. at 621; *International Paper Co. v. Federal Power Comm'n*, 476 F.2d 121 (5th Cir. 1973). They also expected that, to the extent such liability might be imposed, it would only be imposed under a uniform federal standard that was fair and consistent with the comprehensive scheme of federal regulation.

In Petitioner's curtailment proceedings the Commission, after long deliberation, confirmed that pipelines cannot be subjected to curtailment liability solely for adhering to filed tariffs. Rather, the Commission held, there must be a showing of negligence or willful misconduct. The Fifth Circuit affirmed, and made clear that the Commission's standard was a substantive one from which states cannot deviate. The Fifth Circuit also ob-

served that the standard applied by the Louisiana Court of Appeal in holding Petitioner liable for $180 million in curtailment damages fell short of the federal standard, but it assumed that the state courts would rectify the situation by "enforc[ing] the federal standard . . . ." Pet. App. G at 181a-182a, n.15. In fact, the Louisiana courts twice, *without comment*, refused requests that the judgment be reconsidered in light of the federal negligence standard. Pet. App. B and D.

Natural gas pipelines are bound by final rulings of the Commission, and rely upon the finality of such rulings. As part of the federal regulatory scheme, it is expected that, once established, Commission policies will be applied consistently to all regulated entities. 15 U.S.C. § 717c; *Northern Natural Gas Co. v. State Corp. Comm'n*, 372 U.S. at 91-92. Therefore, it is critical from the standpoint of the interstate pipeline industry that final Commission action, particularly action limiting the scope of state law with regard to liability for federal regulated activities, be honored, and that the paramount power of properly exercised federal authority over state law be preserved.

The Louisiana Court of Appeal decision stands in conflict with these principles and casts a cloud over the validity of final agency action. If the decision is allowed to stand, pipelines will be confronted with great uncertainty as to which final Commission actions can be relied upon as valid.

Such uncertainty undermines both the authority of the Commission to assure that its orders are made effective, and the legitimate reliance of regulated pipelines that they will not be penalized for following Commission orders. When the Commission explicitly defines a standard for liability, preempting inconsistent state standards, pipelines subject to Commission authority must have the assurance that such a declaration is effective. Absent such assurance, regulated pipelines could not know what

legal standard would govern their conduct and would not be able to conform their conduct to the applicable standard. Thus, the difficulties created by the Louisiana Court action have a compelling practical effect on companies subject to federal regulation.

In short, the Louisiana Court of Appeal decision effectively negates the express ruling of the Commission made in the exercise of its exclusive jurisdiction: that a pipeline will not be subjected to liability for curtailments carried out under filed tariffs unless shown to have been negligent or worse in bringing about those curtailments. There is no basis for the Louisiana courts' failure to adhere to this standard. Such failure impairs the confidence of pipelines in the Commission's ability to afford them protection from unwarranted liability and thwarts the Commission's achievement of its regulatory objectives.

II. THE LIABILITY STANDARDS APPLIED BY THE LOUISIANA COURT OF APPEAL ARE IN CONFLICT WITH THE NORMS OF CONDUCT UNDER THE NGA.

In adopting its negligence standard, the Commission made another fundamental determination: the finding of negligence was to be made exclusively by the courts. Pet. App. E at 139a. However, this Court on other occasions has cautioned against permitting states to impose on regulated entities their "own version of reasonable service requirements . . . ."[4]

Thus, while state courts may evaluate the reasonableness of pipeline's actions in determining whether it improperly caused its curtailments, they may not make such an evaluation based upon the state's "own version of reasonable service requirements." Indeed, this is the reason the Commission and the Fifth Circuit have expressly held

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[4] *Chicago and North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 326 (1981); *accord Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 580 (1981).

that pipeline liability for curtailments must be determined under a negligence standard, the elements of which were articulated by the Fifth Circuit. The Fifth Circuit stated that the standard was one of "objective reasonableness." Pet. App. G at 183a. In essence, "proof of foreseeability is a necessary element of the Commission's standard" because "[i]f the need for curtailment was not reasonably foreseeable, imposition of liability for curtailments does little to encourage prudent management." *Id.*

The standard under which the Louisiana Court of Appeal held Petitioner liable is not one of "objective reasonableness." Rather, the court applied Louisiana's own version of what constitutes reasonable service requirements for a pipeline doing business in the state. In the eyes of the Louisiana court, Petitioner's fault was in making management decisions aimed either at avoiding "increased costs to perform . . ." or at "saving costs." [5] Indeed, the core of the Louisiana court's critique of Petitioner's conduct was that Petitioner had neglected its "implied [contractual] obligations to have and maintain, or to acquire, *at whatever cost*, the gas necessary to fulfill the explicit delivery obligations." Pet. App. A at 9a (emphasis added).

By defining a pipeline's fault as failing to acquire gas "at whatever cost," the Louisiana court imposed a standard that is fundamentally at odds with a pipeline's service obligations under the NGA and with industry norms. A central principle of federal regulation is that pipelines are charged with rendering adequate service at the lowest

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[5] Pet. App. A at 11a, 15a. Specifically, the Louisiana Court of Appeal found that, with respect to Petitioner's release of reserves in the early 1960's to reduce take-or-pay costs, while Petitioner "does show that take-or-pay costs and other considerations prompted its business decisions, . . . increased costs to perform do not excuse nonperformance of contracts." *Id.* at 11a. The court also criticized Petitioner for taking actions for "business reasons aimed not at performance of its contracts but at saving costs . . . ." *Id.* at 15a.

reasonable cost.[6] This means that, under appropriate circumstances, a pipeline's decision to reduce inventory either by reducing or eliminating the purchase of costly gas supplies or releasing high-priced reserves may be perfectly reasonable—even required—under the NGA.[7]

These considerations are of paramount practical significance to pipelines today and in the future. The unforeseen oversupply of gas that has prevailed nationally in the mid- and late 1980's has led to a sharp decline in gas prices, and nearly all interstate pipelines have released substantial reserves originally contracted for at higher prices in order to meet price competition.[8] In order to facilitate economic efficiency, it has been the policy of the Commission to encourage such releases, even though they reduce a pipeline's reserve inventory.[9] If a

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[6] *Atlantic Ref. Co. v. Public Serv. Comm'n*, 360 U.S. 378, 380 (1959); *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 611 (1944); *Midwestern Gas Transmission Co.*, 36 F.P.C. 61, 70 (1966), *aff'd*, *Midwestern Gas Transmission Co. v. Federal Power Comm'n*, 388 F.2d 444 (7th Cir.) *cert. denied*, 392 U.S. 928 (1968).

[7] *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968). In this regard, the Commission's recent order promulgating a new abandonment policy to facilitate, *inter alia*, abandonment of gas purchases under expired, terminated or modified gas purchase contracts suggests as one rationale for such policy that such abandonment will encourage economic efficiency. *Abandonment of Sales and Purchases of Natural Gas Under Expired, Terminated, or Modified Contracts*, Order No. 490, 53 Fed. Reg. 4,121, 4,124 (Feb. 12, 1988), F.E.R.C. Statutes and Regulations ¶ 30,797, at 31,026, *appeal docketed sub nom. Marathon Oil Co. v. Federal Energy Regulatory Comm'n*, No. 88-3666 (6th Cir. July 26, 1988).

[8] *See, e.g., Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 500, 52 Fed. Reg. 30,334, (Aug. 14, 1987), F.E.R.C. Statutes and Regulations ¶ 30,761, *appeal docketed sub nom. American Gas Ass'n v. Federal Energy Regulatory Comm'n*, No. 87-1588, *et al.* (D.C. Cir. Oct. 19, 1987).

[9] *See Abandonment of Sales and Purchases of Natural Gas Under Expired, Terminated, or Modified Contracts*, Order No. 490, 53

future shortage necessitating curtailments should occur, application of the Louisiana standard rather than the Commission standard in evaluating a pipeline's conduct could result in widespread imposition of liability for actions taken in conformity with the Commission's policies. It is critical that actions be judged on the basis of Commission policies in effect at the time the actions were taken and not on the basis of factual circumstances that evolved afterward. Thus, the interest of the interstate pipeline industry in the issue before this Court is very practical and by no means abstract.

In holding Petitioner liable for curtailments based on its failure to maintain or acquire gas "whatever the cost," the Louisiana Court of Appeal has mandated that interstate pipelines operating in Louisiana abide by a standard that conflicts directly with the norms under which pipelines perform their service obligations under the NGA. The Louisiana court's action exemplifies why the federal negligence standard is the correct standard and why it must be adhered to by state courts.

Fed. Reg. at 4124-26, F.E.R.C. Statutes and Regulations at 31,025-28.

CONCLUSION

The issues of law and public policy raised by this case are of deep and immediate concern to the interstate natural gas pipeline industry. The conflict between the Louisiana Court of Appeal decision and the Commission's order as affirmed by the Fifth Circuit must be resolved by this Court to preserve the integrity and preemptive effect of Commission jurisdiction, to permit achievement of Commission's regulatory objectives, and to restore confidence in the federal regulatory scheme. Accordingly, INGAA urges this court to issue a writ of certiorari in this proceeding.

Respectfully submitted,

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September 27, 1988

APPENDIX

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1988 ACTIVE MEMBERSHIP

AlaTenn Resources, Inc.
Arkla, Inc.
The Coastal Corporation
Columbia Gas Transmission Corp.
Consolidated Natural Gas Company
El Paso Natural Gas Company
Enron Corp.
Foothills Pipe Lines (Yukon) Ltd.
Granite State Gas Transmission, Inc.
Great Lakes Gas Transmission Company
Kentucky West Virginia Gas Company
KN Energy, Inc.
Lone Star Gas Company
Michigan Gas Storage Company
MidCon Corp.
Pacific Gas Transmission Company
Pacific Interstate Company
Panhandle Eastern Corporation
Polo Energy Corporation
Questar Pipeline Company
SONAT, Inc.
Tenneco Gas Pipeline Group
Texas Eastern Gas Pipeline Company
Texas Gas Transmission Corporation
Texas Oil & Gas Corporation
TransCanada Pipe Lines
Transcontinental Gas Pipe Line Corporation
United Gas Pipe Line Company
Valero Interstate Transmission Company
Valley Gas Transmission, Inc.
Westcoast Energy Inc.

No. 88-191 (8)

In The

Supreme Court of the United States

October Term, 1988

UNITED GAS PIPE LINE COMPANY,

Petitioner,

v.

LOUISIANA POWER & LIGHT COMPANY,

Respondent.

On Petition For Writ of Certiorari To The Louisiana Court of Appeal, Fourth Circuit

OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

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OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

NOW COME Respondents, Louisiana Power & Light Company ("LP&L"), Louisiana Public Service Commission, and City of New Orleans, and state their Opposition to the Motion of Interstate Natural Gas Association of America ("INGAA") for leave to file Brief Amicus Curiae, for the following reasons:

On August 2, 1988, counsel for Respondent LP&L received a letter, dated July 28, 1988, from Mr. John H. Cheatham, III, an attorney for INGAA, who stated that his organization desired to file a brief in support of

petitioner, United Gas Pipe Line Company. United is a member of INGAA, as is MidCon Corp., one of the wholly-owned subsidiaries of Occidental Petroleum Corporation that will actually pay any judgment in this case. (Petition at ii.)

Counsel for LP&L stated its opposition to this request, as did counsel for other Respondents. (A copy of LP&L's letter to INGAA stating this opposition is attached.)

Despite this Court's rule that an amicus brief in such circumstances is not favored (Rule 36.1), INGAA nevertheless filed a motion for leave with attached amicus brief on September 27, 1988, contemporaneously with the filing of Respondents' Briefs in Opposition to the Petition. By filing on the same date that Respondents filed their briefs with the Court, INGAA has deliberately deprived Respondents of an opportunity to respond to INGAA's erroneous arguments. Although INGAA's filing on the Respondents' date may be within the letter of Rule 36.1 as presently written, the Court's prior rule required such a Brief to be filed at "a reasonable time" prior to the consideration of the petition by the Court. Respondents understand this still to be the intent of the rule. *See,* Stern & Gressman, *Supreme Court Practice,* 6th Ed., p. 395. INGAA's time of filing is not reasonable and was chosen by INGAA to prejudice Respondents. This Court should not countenance such sharp practice.

INGAA was not a party to any of the United litigation, state or federal, and specifically cannot claim to be familiar with the extensive record of United's fault which the Petition seeks to bring to this Court. The policy

arguments of INGAA, however, were made to the Federal Energy Regulatory Commission, and rejected by it in Opinion No. 248, *Transcontinental Gas Pipe Line Corp.*, 35 F.E.R.C. (CCH) ¶ 61,043 (1986) and in Opinion No. 248-A, *Transcontinental Gas Pipe Line Corp.*, 35 F.E.R.C. (CCH) ¶ 61,340 (1986). INGAA's same arguments made on appeal in that case were also rejected by the United States Court of Appeals for the D.C. Circuit. *Transcontinental Gas Pipe Line Corp. v. FERC*, No. 86-1358 (D.C. Cir. order entered Feb. 16, 1988, order on rehearing entered April 22, 1988) (Resp.App. B at 3a). Those decisions are final, and INGAA should not be allowed to seek their review in the guise of amicus here.

Respectfully submitted,

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Mr. John H. Cheatham, III
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Interstate Natural Gas Association of America
1660 L Street, N.W.
Washington, D.C. 20036

Re: United Gas Pipe Line Company v. Louisiana Power & Light Company

Dear Mr. Cheatham:

We are in receipt of your letter dated July 28, 1988, requesting LP&L's consent to allow INGAA to participate as *amicus curiae* in the proceedings in the United States Supreme Court provoked by a Petition for Certiorari filed in the name of "United Gas Pipe Line Company."

As we discussed on the telephone, LP&L is unable to grant such consent and we are returning, as you requested, your letter unsigned.

Permit me to again state our disappointment that the Interstate Natural Gas Association of America chooses to interject itself in this matter. United's judgment liability

has been assumed by others, and, in any event, the poor performance of United in the 1960's and 1970's which led to its liability is common knowledge in the industry. It is unfortunate that your association has decided to waste its resources defending the indefensible.

Yours truly,
/s/ Terrence G. O'Brien
Terrence G. O'Brien

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July 28, 1988

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RE: *United Gas Pipline Company v. Louisiana Power & Light Company,* S.Ct. No.___, October Term, 1988, Petition for Certiorari.

Dear Mr. O'Brien:

The Interstate Natural Gas Association of America ("INGAA"), is a national trade association representing virtually all interstate natural gas transmission companies doing business in the United States. Pursuant to Rule 36 of the Rules of United States Supreme Court, 28 U.S.C., I am requesting you consent to allow INGAA to participate, *amicus curiae* in the referenced case. Please indicate your consent by signing the signature block below, and return this letter to me in the enclosed stamped self-addressed envelope. In the event that you do not consent to our participation, please return the letter to me unsigned.

Sincerely,
/s/John H. Cheatham, III
John H. Cheatham, III
Senior Vice President
and General Counsel

On behalf of Louisiana Power & Light Company, I hereby consent to the full participation of the Interstate Natural Gas Association of America in the referenced case.

(handwritten) Consent Refused
/s/ Terrence O'Brien

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